United States Court of Appeals

for the

District of Columbia Circuit

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,966

AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition to Review An Order of the National Labor Relations Board

BRIEF FOR THE AMERICAN BAKERY & CONFECTIONARY WORKERS INTERNATIONAL UNION, AFL-CIO, PETITIONER

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I. STATEMENT OF ISSUES PRESENTED

The Board and the American Bakery & Confectionery Workers International Union, AFL-CIO ("Union") have stipulated that the issues in No. 21,966 are:

1. Whether the Board properly found that employees John Beatty, Gerald Goss, Allen Coudriet and Charles Hoar were properly discharged for engaging in flagrant acts of strike misconduct unprotected by the Act and were not entitled to reinstatement.

2. Whether the Board properly found that the Company did not violate Section 8(a)(3) and (1) of the Act by refusing to reinstate unfair labor practice strikers who conditioned their offer to return to work on

reinstatement of all the strikers, including the four employees that the Board found were properly discharged for strike misconduct.*

II. STATEMENT OF THE CASE

A. The Board Proceedings

This matter is before the Court upon the petition of the Union to review an order of the National Labor Relations Board and upon the Board's petition to enforce that order against Beaver Brothers Baking Company ("Beaver Bros." or "Company"). The Board's order issued on March 23, 1968 and is reported at 171 NLRB No. 98 (slip opinion) (A. 1051 et seq.).

The procedural history of this case is more complex than usual, involving two Examiner decisions, and both a remand and a reversal in part by the Board. The Trial Examiner first found that the Employer had violated Sections 8(a)(1) and (3) of the Act by coercively interrogating and threatening its employees, and by discharging three of them for engaging in union activity. He also found that the Company had lawfully refused to bargain with the Union (a refusal which prompted a protracted and bitter strike) because the General Counsel had failed to prove that the Union had a majority (TXD 19-20) (A. 1029-1031).

Thereafter, the Board remanded the case to the Examiner to allow the General Counsel to authenticate authorization cards which the Examiner had rejected on the basis of a post-hearing change in the Board's view of the law. Again, the Examiner found that the employer properly rejected the Union's bargaining demand this time, *inter alia*, because certain cards were tained by coercion. The Board reversed that finding, held unlawful the employer's refusal to respect the Union's mandate from a majority of its employees, and found that unfair labor practice caused the ensuing strike. Accordingly, the Board ordered the employer to bargain,

* The instant case has not been before this Court previously.

and to remedy the other unfair labor practices which the Examiner and the Board agreed Beaver Brothers had committed. It did not, however, direct reinstatement of four unfair labor practice strikers (see below) or require the Company to reimburse its employees for the two months they spent on the picket line after Beaver Brothers refused to reinstate them when the Union first sought to end the strike. Briefly summarized, the facts follow.

B. Statement of Facts

This case brings before the Court a labor dispute more reminiscent of the early days of the Wagner Act than of modern, sophisticated industrial relations. Lurking beneath the clipped legal prose of the decisions of the Labor Board and its Examiner is a tale of stubborn resistance to the rights of employees and deep hostility to the principles of collective bargaining which all too often, even in recent years, has surfaced in the proceedings before this and other Courts of Appeals. The familiar phases sound strangely anachronistic: a Company President telling an employee that "he wouldn't operate under a union" and "would not have anybody else tell him how to run his business" (TXD 3) (A. 1013); a Plant Manager responding to an employee's request for a raise with a warning that "you know you fouled yourself up a while back when you got yourself involved with this union" (TXD 3) (A. 1013); a warning to another employer that if he "had any intentions of starting a union . . . just forget it," and a warning (later implemented) that if an employee had instigaged union organization "we will get rid of him" (D. & O. 8 A. 1058, TXD 5-6 A. 1015-1016).

The pattern of conduct is familiar, too: repeated questioning of employees about their own and other employees' attitudes towards the union; the Company President's response when asked to discuss recognition that "we don't recognize any unions" (D. & O. 6 A. 1056) and, upon the Company's reiteration that it could not recognize the employees' representative, a strike. (TXD 4-5 A. 1014-1015),

There are, of course, some modern wrinkles. The Company President justified his refusal to discuss recognition with a union representative, who sought to avert the strike at the last minute, by saying "as far as I know it [is] in the hands of the attorneys" (TXD 5 A. 1015); and he testified that he doubted the validity of authorization cards as proof of a union's majority because he had read in a pamphlet given to him by counsel that authorization cards are sometimes obtained by coercion, and, that when they are, they are "ruled out"—presumably by the Board (D. & O. 6 A. 1056).

Sadly, but predictably, this kind of primitive conduct provoked such desparation and anger among some of the employees that they at times threw rocks at Company vehicles and property, and made threatening remarks to employees who remained "loyal" to the employer and worked during the strike. Fortunately, except for a bruised thigh, no one was injured during the affair and the property damage which occurred was minor—some broken glass, a scratched vehicle, and some unidentified bakery products thrown over an embankment of unknown height (TXD 21, 22, 23 A. 1031-1033).

We leave to the Board's brief the detailed recitation (and categorization) of the employer's misconduct. We are primarily concerned with what happened when the Union realized that it could not wrest the employees' legal rights from the employer without the Board's help and sought to end the strike. On October 20, 1965, after the strike was almost a month old, the Union sent the employer a telegram which read as follows (TXD 20 A. 1030):

> "All of your employees who are presently protesting your unfair labor practice hereby unconditionally offer to return to work as of Thursday, October 21, 1965. Mr. John Beatty or Mr. Martin Bacon will contact your office for starting time of each worker at 11 AM Thursday, October 21 (TXD 20; GC 5, Tr. 57-58 A. 949)."

The Company promptly responded. It decided to fire seven employees, including the principal strike leaders, for alleged misconduct. (TXD 20 A. 1030). It notified the Union that it would reinstate the remaining employees, and mailed the seven employees discharge letters. (TXD 20 A. 1030). When the Union tried, but failed, to persuade the Company to resolve the alleged misconduct problem in a "proper hearing", it predictably continued the strike for two more months. Finally, on December 28, 1965 the Union telegraphed the employer and asked that all strikers be reinstated, offering to return to work "unconditionally." (TXD 20 A. 1030). This proposal the Company accepted.

That was almost four years ago. This proceeding is now before the Court upon the Board's petition to enforce an order purporting to remedy the violations of employee rights which the employer committed. We seek review of the Board's refusal to order the reinstatement of four stikers: (John Beatty, Joe Goss, Charles Hoar, and Allen Coudriet) two of them (Beatty and Hoar) the principal union supporters, and to direct the employer to compensate the employees for the additional two months of lost wages which resulted from the employer's discharge of the seven employees when the Union first sought to capitulate.

The Board's finding and conclusion with respect to these matters consisted of one sentence, in a footnote. "The Trial Examiner found, and we agree, even though finding an unfair labor practice strike, that the Respondent was warranted in discharging and refusing to reinstate four strikers because of their strike misconduct, and Respondent was therefore privileged to reject the Union's conditional offer." (D. & O. 10, n. 13 A. 1060). The Trial Examiner, in turn had rejected the allegation in the Complaint that the four employees had been discharged for engaging in protected activity (TXD 2, 21-24, 27 A. 1012, 1031-1034, 1037). We contend that the Board's findings were inadequate; and not supported by the record, and that accordingly, the four dis-

charged strikers should be reinstated with back pay and the remaining strikers should be awarded back pay for the period between October 20th and December 28th, 1965.

III. ARGUMENT

A. IN DECIDING THAT THE COMPANY WAS NOT OBLIGED TO REINSTATE COUDRIET, GOSS, BEATTY AND HOAR THE BOARD FAILED TO MAKE FINDINGS REQUIRED BY THE THAYER DOCTRINE.

1. Introduction

This proceeding must be remanded to the Board because it failed to make findings, required by this Court's decision in Local 833, *UAW* v. *NLRB*, 112 U.S. App. D.C. 107, 300 F.2d 699 (1961); *cert. denied*, 382 U.S. 836 (1962). That decision requires the Board to balance an unfair labor practice striker's misconduct on the one hand against the seriousness of the employer's unfair labor practices, the degree of employer provocation, the employee's prior employment record, and his fitness for continued employment, on the other, in order to determine whether reinstatment of the employee would effectuate the purposes of the Act. The Trial Examiner, who found that the strike during which the misconduct at issue here occurred was not provoked by unfair labor practices, did not strike that balance because he had no occasion to. All he decided was that the employees had been fired for misconduct, and not for striking. The Board simply rubber stamped the Trial Examiner's conclusion that the employer's refusal to reinstate "was warranted". D. & O., 10, n. 13. A. 1060. It made no findings relevant to the determination *it* was required to make—whether reinstatement, would effectuate the policies of the Act. Accordingly, that portion of its order denying reinstatement must be remanded. We explain our contention in detail below.

2. The Findings and the Failure

In *Local 833, UAW* v. *NLRB*, 112 U.S. App. D.C. 107, 300 F.2d 699 (1961), *cert. denied*, 382 U.S. 836 (1962), this Court directed the Board to follow the doctrine formulated

by Judge Magruder in his celebrated decision in *NLRB* v. *Thayer Co.*, 213 F.2d 748 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954). In *Thayer*, as in *Local 833, supra* and in this case, the Board had failed to order certain employes reinstated because they engaged in misconduct during the course of an unfair labor practice strike. Explaining the rule of law to be applied in such cases, this Court wrote (112 U.S. App. D.C. 110, 112, 300 F.2d 702-03, 704):

> "Thayer holds that where an employer who has committed unfair labor practices discharges employees for unprotected acts of misconduct, the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determining whether reinstatement would effectuate the policies of the Act. Those policies inevitably come into conflict when both labor and management are at fault."
>
> • • • • • • • • • •
>
> "In ordering the Board to reconsider its determination not to reinstate certain employees who had engaged in unprotected acts of misconduct, the Thayer court reasoned that where the issue is simply whether a discharge was an attempt to coerce employees in the exercise of their rights under § 7, a finding that an employee was fired for participation in unprotected activity ends the inquiry; but where there has been an antecedent employer unfair labor practice, a finding that employees have engaged in unprotected activity is only the first step in determining whether reinstatement is appropriate. We think that view of the Board's remedial powers is correct. See *National Labor Relations Board* v. *Thayer Co., supra; Republic Steel Corp.* v. *National Labor Relations Board*, 107 F.2d 472, 479-480 (3rd Cir. 1939), modified on other grounds, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed 6 (1940); *National Labor Relations Board* v. *Deena Artware, Inc.*, 198 F.2d 645 (6th Cir. 1952),

cert. denied, 345 U.S. 906, 73 S.Ct. 644, 97 L.Ed. 1342 (1953); *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F.2d 167, 176 (3rd. Cir. 1939), cert. denied, 308 U.S. 605, 60 S.Ct. 142, 84 L.Ed. 506 (1939); *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F.2d 221 (3d Cir.), Cert. denied, 311 U.S. 705, 61 S.Ct. 170, 85 L.Ed. 457 (1940); *National Labor Relations Board* v. *Anchor Rome Mills*, 228 F.2d 775 (5th Cir. 1956)."

And, examining the case before it, the Court said 112 U.S. App. D.C. 111, 300 F.2d at 703):

> ". . . [A]utomatic denial of reinstatement prevents the Board from protecting the rights of employees, but may not be essential to the protection of legitimate interests of employers and the public. We conclude that the teaching of the *Thayer* case is sound and must be followed in order to assure the Board's compliance with the statutory command that its remedial orders effectuate the policies of the Act.
>
> The record indicates that the Board disregarded the *Thayer* doctrine. Despite exceptions taken by both the Union and the general counsel to the Trial Examiner's express refusal to follow Thayer, the Board's decision refers neither to the doctrine nor to the considerations it requires."

The Board, although it disregarded the *Thayer* doctrine in *Local 833, supra* has since embraced and applied it. *E.g., Elmira Mach. & Spec. Works*, 148 NLRB 1695 (1964); *Oneita Knitting Mills, Inc.*, 153 NLRB 51, 57-64 (1965); *Quality Limestone Prods., Inc.*, 153 NLRB 1009, 1012, n. 5, 1013-15 (1965); *J. P. Stevens Co.*, 157 NLRB 869, 878 n. 8 (1967), modified on other grounds and enforced, 380 F.2d 292 (2d Cir. 1967). Here, however, the Board failed to make the findings and strike the balance which *Thayer* requires.

The Examiner, of course, had no occasion to decide whether reinstatement of strikers fired for misconduct would effectuate the purposes of the Act, because he found that the strike had not been provoked by an unfair labor practice (TX 20, 27 A. 1030, 1037). When the Board reversed that finding, it was required to consider afresh whether the misconduct which had allegedly provoked the discharges was so serious that none of the employees involved should be reinstated in order to vindicate the rights of all the employees which had been denigrated by the Company's contemptous disregard for the law. It is no coincidence that the Board reached precisely the same result with respect to each employee as the Trial Examiner had. It simply failed to perform the altogether different task which its unfair labor practice finding required.

The Board's opinion makes that failure transparent. Its entire treatment of the problem consists of a footnote (D. & O. p. 10, n. 13 A. 1060) (*emphasis added*).

> The Trial Examiner found, and we agree, even though finding an unfair labor practice strike, that the Respondent was warranted in discharging and refusing to reinstate four strikers because of their strike misconduct . . . .

Thus, it is no mere coincidence that the same employees who were held by the Examiner not to have been discharged for engaging in protected activity were held by the Board not entitled to reinstatement. The Board viewed the question before it as whether the employer *was warranted* in discharging the employees; not whether the purposes of the Act would be furthered by their reinstatement and whether their misconduct barred the *Board* from ordering such reinstatement. See Local 833, UAW, *supra,* 112 U.S. App. D.C. 113, 300 F.2d 705.

The language of the Board's opinion is revealing enough, but the content of its decision decisively demonstrates that

it failed to engage in the analysis which *Local* 833 requires. Here, as there, the Board did not "allude to factors which may be relevant considerations . . . such as the employer's unfair labor practices, each employee's job history, and the relationship between the acts of misconduct and fitness for continued service." Local 833, *supra,* 112 U.S. App. D.C. 113, 300 F.2d 705. There is not a word about these matters. Nor is there any reference to facts which might bear upon them.

The Board did not allude to Goss' ten years of employment with the Company (Tr. 109), or Hoar's even longer employment history. (Tr. 204). It was silent about the impact upon the employees' felt freedom to engage in protected activities of failing to reinstate Beatty, the main driving force behind the union organizing campaign, who had boldly confronted management with the Union's recognition demand and who, with Hoar, had first contacted the Union and arranged the initial meeting with its representatives (TXD A. 1013). Nor did it consider the degree of provocation for Beatty's misconduct. Compare Local 833, *supra,* 112 U.S. App. D.C. 110, 300 F.2d 703, when the Company's production manager warned Beatty that the Company would close its doors rather than deal with a union, and later, in response to Beatty's request for a raise, told him that "You know you fouled yourself up a while back when you got yourself involved with this Union." (TXD 3 A. 1013). The Board's decision is entirely silent about the relationship between Goss' misbehavior during the strike which respondent had provoked and the plant manager's pre-strike warning to Goss that ". . . if he had any intention of starting a union to 'just forget it'," and the manager's comment that "he likes his job too well for a union to come into the Bakery." (TXD 3 A. 1013).

Unlawful conduct of this sort by top Company officials obviously provoked a sense of desparation and anger among employees committed to the Union's effort; the Board is directed to weigh that provocation *Local 833 supra,* 112 U.S.

App. D.C. 110, 300 F.2d 702; it patently ignored it. Then, too, the Board in deciding whether to direct reinstatement of unfair labor practice strikers is directed to make an independent judgment concerning the "continued fitness for employment" of employes who have been lawfully discharged—not merely to decide whether the *employer's* decision "was warranted," D.O. p. 10, n. 13 A. 1060 *Local 833, supra,* 112 U.S. App. D.C. 113, 300 F.2d at 705; *Puerto Rico Rayon Mills, Inc.,* 117 NLRB 1355, 1357 (1957). But one has to comb the record to discover that Hoar, for example, had worked thirteen or fourteen years so far as appears, without incident, until the Company provoked an unfair labor practice strike. The Board apparently thought that fact irrelevant, since it never mentioned it. And nowhere does the Board discuss whether the four employees' misconduct, weighed against their job histories and the provocation—direct and indirect—inherent in the Employer's conduct—demonstrated unfitness for future service. In sum, the Board did not make any of the findings which Thayer, as explained in this Court's *Local 833* decision, requires.

The failure to make such findings is fatal. Even if the record would have sustained the Board's ultimate conclusion (a matter we discuss below), "administrative action cannot be upheld merely because findings might have been made and considerations disclosed which would justify . . . [the] order . . . There must be a responsible finding." *Boudin* v. *Dulles,* 98 U.S. App. D.C. 305, 235, F.2d 532, 535 (1956). ". . . [S]ince the Board failed to make findings in connection with these reasons, 'we cannot decide now whether [they] suffice to support the order.' 'The grounds upon which an administrative order must be judged are those which the record discloses that its action was based.' Findings are essential not only to facilitate judicial review by revealing the factual basis for agency action but also to reflect the 'determination of policy or judgment which the agency alone is authorized to make . . .'." *NLRB* v. *Capital*

Transit Co., 95 U.S. App. D.C. 310, 221 F.2d 864, 867 (1955). (footnotes omitted). Accord, *Capital Transit Co.* v. *PUC.* 93 U.S. App. D.C. 194, 213 F.2d 176, 182-184 (1959). cert. denied, 348 U.S. 816; *Mississippi Riv. Fuel Corp.* v. *FPC*, 82 U.S. App. D.C. 208, 163 F2d 433, 449 (1947); *Retail Store Employees Union, Local 400*, 123 US. App. D.C. 360, 360 F.2d 494, 496 (1965). As the Supreme Court has written, ". . . it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the . . . [Board] applies, and the essential fairness of the mode by which it reaches its conclusions, that the . . . [Board] do [sic] not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review." *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 81 (1953).

B. BEATTY, HOAR, GOSS AND COUDRIET SHOULD HAVE BEEN REINSTATED.

1. Gerald Goss

Goss, as we have pointed out above, had worked for the Company for ten years before he joined the Union (Tr. 109). Just prior to his joining, Goss was warned by the Plant Manager that if had any intention of starting a union to forget it (TXD 3 A. 1013). And Goss was with Beatty when Stuckey and Beaver overtook the employees' automobile and blocked their path for five minutes one night by driving "crossways in the middle of the road." p. 14, *infra.*

During the strike, Goss and some other employees prevented a supervisor and two non-strikers from picking up a load of products by yelling at them "You're not going to unload that merchandise." (TXD 23 A. 1033). As the truck drove off, stones were thrown at it from the rear, some of which struck the truck. But the testimony, identifying Goss as having thrown rocks at the rear of the departing truck was weak, indeed. The incident occurred late at night when it was completely dark (Tr. 730). And the same (and only)

witness who testified that he saw Goss throw the stones, also testified that Kelley threw them. (Tr. 424). Kelley wasn't even there (TXD 25 A. 1035). Since the witness was in the cab of the truck, and the stones came from behind, his claim to have identified Goss as the culprit is beyond credence. On another occasion, after he had been fired, Goss threw stones at the panel of a truck (TXD 23 A. 1033). So far as appears, no damage was done on either occasion. And he picked up two or three nails that were on the ground and threw them into the Company parking lot. (Tr. 733).

What apparently led the Board to deny Goss' reinstatement, however, was that Goss admitted that he threw some abandoned bakery products destined for the Company over the side of an embankment, thus engaging in what the Examiner characterized as the "destruction of property." But the record does not show what those bakery products were and, while the Examiner found that a local newspaper had reported they were valued at $80.00, that evidence is incompetent hearsay affording no basis for evaluating value of the products and therefore the seriousness of the misconduct.

Yet except for the unidentified bakery products he threw over an embankment, Goss damaged no property and injured no person. Under the circumstances, the Board's refusal to grant him reinstatement was clear error. See *NLRB* v. *Wallick,* 198 F. 2d 477, 480, 485 (3rd Cir. 1952) (metal pins driven into ground; doors barred by strikers; one or two windows broken; strikers reinstated); *Quality Limestone Prods., Inc.* 153 NLRB 1009, 1011-1012, n. 5, 1013 (1964) (tire slashing, breaking of stone window being transported through picket line not grounds for denying reinstatment).

2. John Beatty

As we have already pointed out, Beatty was one of the leaders, if not the leader, of the Union's organizing campaign. It was he who first arranged for an employees' meeting with union representatives (TXD 3 A. 1013), and he

was Chairman of the employee Committee (Tr. 101). Beatty and another employee first informed the Company that the Union wanted to discuss recognition (TXD 21 A. 1031). Earlier, a top Company official had warned Beatty that he had "fouled himself" up by becoming involved with a Union, and that the Company would close down rather than deal wtih one (TXD 3 A. 1013). Moreover, Beatty was subjected to provocation during the strike. Supervisor O'Donnell told Beatty that there was a whole line of people waiting to "get" Beatty, and that he (O'Donnell) was in that line. (Tr. 447). And on one occasion President Beaver and General Manager Stuckey pulled a Company car "crossways in the middle of the road," and maneuvered it back and forth for about five minutes in front of Beatty's car, preventing Beatty and Goss from driving past. (Tr. 778). Against such provocation—surely sufficient to outrage the calmest of men—the record fails to show that Beatty was not entiled to reinstatement because he had proven himself unfit for future service. See *Puerto Rico Rayon Mills, Inc.*, 117 NLRB 1355, 1357 (1957).

The Board found that Beatty had threatened an employee that his life was in danger and had thrown a rock through the employee's car window. (TXD 21 A. 1031). That finding cannot stand. It is based upon General Manager Stuckey's testimony relating his conversation with the employee allegedly threatened. Such testimony is, of course, hearsay, inadmissible to prove that the events occurred, *e.g.*, *Superior Engraving Co.* v. *NLRB*, 183 F. 2d 783, 792 (7th Cir. 1950), as the Examiner recognized. (See below.)

Apparently, the Examiner thought he could find that these events occurred because "Beatty did not deny the incident" (TXD 21 A. 1031). But the Examiner could not possibly draw any inference from Beatty's silence because Counsel had no reason to ask Beatty about the matter. During Stuckey's testimony, the following colloquy occurred (Tr. 509-510) (*emphasis added*):

A. At this time, on the second occasion, Mr. Holdridge came and reported to me that he had observed, as he was driving from the street onto the company parking lot to go to the loading dock with his truck, John Beatty had thrown a rock which had broken the window next to his face. He was all excited because of the fact that it hit right beside his face.

TRIAL EXAMINER: Has this anything to do with the good faith of the company?

MR. BORIS: Yes, sir. I believe that in the case of dismissal, for strike violence, the law states that dismissal is justified if Respondent—if the employer knows or has a good faith and believes that certain employees perpetrated certain unlawful acts.

TRIAL EXAMINER: Isn't this hearsay in connection with the occurence of the alleged incident?

MR. BORIS: It goes to the good faith, the foundation for the discharge and not to whether or not the act was actually done.

TRIAL EXAMINER: Very well. *It's limited to that issue only.*

Since the testimony was admitted with the understanding that it would be used only to show what the Company had been told, there was no reason to ask Beatty about the incident: he could not testify as to what the Company heard.

The Board also relied upon testimony that Beatty had thrown a rock at a truck and broken a mirror. But even by the wide latitude accorded Trial Examiners, that testimony cannot stand. The witness testified that: on October 1, after 10:00 p.m., as he drove a truck into the Company lot, he observed a group of "the boys" on the sidewalk nearby (Tr. 325), and he was bombarded with rocks. Supposedly, he observed Beatty standing under a street light. The wit-

ness was so entranced at seeing Beatty that he continued to watch him in the mirror not only while making a 45-degree turn into a parking lot, but even *after* the rock which he testified Beatty threw had *broken* the mirror! Such testimony "carries its own death wound." *NLRB* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 660 (1949). Nor was Beatty not entitled to reinstatement because he was "at least implicated" in putting nails in a tire (Br. for the Board, p. 49) or because it was "not unreasonable for Production Manager Gaudreau to suspect" that he was implicated. (TXD 22 A. 1032). Surely evidence, not implications, are required to deprive an employee of his right to reinstatement.

Beatty conceded that he had struck the side of a Company car with his hand when the driver (Norwood) drove it through the picket line without giving the pickets an opportunity to get out of the way (Tr. 776), but there is no evidence Beatty scratched the paint off that car (Br. for the Board, p. 49). The testimony upon which the Examiner relied was that Beatty had made two "crescent-shaped" marks of unspecified size or depth on the side of the car. (Tr. 363-64). In addition, Beatty testified that there were four or five people around the conveyor from which Beatty supposedly removed the supports (TXD 22) and that he did not remove them (Tr. 782). Finally, even if Beatty engaged in some of the conduct attributed to him, there is no evidence that he caused any serious property damage, or that he struck or injured anyone. In light of the grave provocations to which he and others were subjected, and the animosity and tension which existed at the time—all resulting from the Company's refusal to abide by the requirements of the Act—the Board should have directed that Beatty be reinstated. See cases cited, *supra* pp. 6-8; *Blue Jeans Corp.*, 175 NLRB No. 149, 68 LRRM 1575 (1968) (employee threatened another with scissors; reinstatement ordered in light of provocation).

3. Charles Hoar

Hoar had been an employee for thirteen or fourteen years when the incidents giving rise to this proceeding occurred. (Tr. 204). He, together with Beatty, led the attempt to obtain union representation for the Company's employees (TXD 3 A. 1013). Apparently, the Company learned about his efforts, because Foreman Lash, following President Beaver's instructions, questioned Hoar about the "difficulty" between him and the Company (Tr. 208-209).

Hoar was among about fifteen employees who came upon a Company truck on the premises of another company where bakery products were to be transferred. Hoar admitted that he told the driver he might as well take the truck back because he wasn't going to receive the cakes at this time. (Tr. 747). Although Hoar's statement could have been interpreted as threatening, he testified that it was made in the presence of a Deputy Sheriff and the Chief of Police who simply told him to order the men back to the picket line, which he did (Tr. 747-48). No arrests were made. This incident clearly did not warrant denying Hoar's reinstatement. See *Quality Limestone Inc.*, 153 NLRB 1009, 1012, n. 5 1013 (1965), where the Board, reversing its Examiner, ordered the reinstatement of employees who had been convicted of disorderly conduct for picket line misconduct resulting in property damage. Nor does the cab-tilting incident warrant preventing this long time employee from returning to his job. Hoar testified that when he tipped the cab forward (something it was designed to do) he did not know what was in it (Tr. 745). No damage was done, no one was hurt, and the Company was not prevented from moving the stalled truck for repair. (TXD 23 A. 1033).

Finally, Hoar testified that he did not throw the rock which bruised Dilliplaine's thigh (Tr. 748). The Union had had difficulty controlling teenagers and outsiders who did throw rocks, and had called the police on one occasion when a particularly troublesome teenager threw some stones at

a Company building. (Tr. 748, 754).[2] It follows that Hoar should be reinstated.

4. Allen Coudriet

Allen Coudriet lost his job, so the Examiner found, because he threw a rock which damaged a company truck (TXD 24 A. 1034). But the testimony cited by the Board (Br. p. 50) does not establish that Coudriet damaged any Company vehicle. Thus, Gregg testified that "they" were throwing rocks (Tr. 432), but he did not know whether Coudriet hit the tractor-trailer (*Ibid*). Stains, a supervisor who rode in the damaged truck, testified that "there were a group of picketers . . . we were hit with a bombardment of rocks. They were coming from all directions." (Tr. 425). Nor does the Stuckey testimony cited by the Board support its finding that Coudriet damaged the New Holland transport—the only truck that was damaged.

Stuckey testified that another employee had thrown rocks at that truck while it was stopped but that Coudriet had thrown rocks at it as *it was departing* (Tr. 497). Since the record evidence on which it relies indicates that a whole group of employees were pelting the truck with stones, blaming the damage on Coudriet was an act of sheer caprice on the part of the Board.

The finding that Coudriet damaged the vehicle is, of course, the basis of the Examiner's determination that he was not discharged in violation of the Act: employee Burge, who engaged in the same conduct, was held to have been

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[2] The Examiner apparently thought that Dilliplaine's precautionary hospitalization "because of a pre-existing heart condition" (TXD 22 A. 1032) the day after Dilliplaine was struck on the thigh was related to the bruise on his leg. But it is common knowledge that tension of any sort is bad for heart patients. In light of the tension engendered by the strike and Dilliphaine's presence in the office when stones broke the windows, the hospitalization cannot reasonably be found to have been caused by the thigh bruise.

discharged unlawfully. TXD 26 A. 1036.[2] It follows that the Board's finding with respect to Coudriet must be reversed, he was unlawfully discharged, and is entitled to reinstatement. See, *e.g.*, *NLRB* v. *Mitchko*, 284 F. 2d 573, 576-577 (3rd Cir. 1960). *Cf. NLRB* v. *Morrison Cafeteria Co.*, 311 F. 2d 534, 538 (8th Cir. 1963).

C. THE BOARD ERRED IN FAILING TO AWARD BACK PAY TO THE STRIKERS.

As we have shown above, Beatty, Hoar, Goss and Coudriet should have been allowed to return to work when the Union first offered to end the strike on October 20, 1965. The Board found that the other three employees—Floyd Leister, Blair Kelley and Richard Burge—whom the employer fired when it seemed that the strike might end—should also have been reinstated (TXD 24-26 A. 1034-1036).[3] Since the strike would have ended but for Beaver Brothers' failure to abide by the law, the Board should have ordered the employer to reimburse the strikers for their lost wages.

Our contention rests solidly on established principles of law which are set out in detail with relevant citations in the Board's brief. The Board writes (Br. pp. 52, 53):

> "A strike caused by an employer's unlawful refusal to meet and negotiate with its employees' collective bargaining representative is clearly an unfair labor practice strike. See, *e.g. General Drivers and Helpers Un-*

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[2] The Examiner also found that Coudriet dared one of the truck drivers to get out of his truck and fight, and Coudriet admitted this. But neither the Board nor the Examiner relied on Coudriet's challenge. The Examiner found that "Coudriet engaged in acts of misconduct which *caused damage to Respondent's property* and imperilled the safety of a nonstriking Truckdriver." (TXD 24 A. 1034). Clearly, the Examiner's ultimate conclusion that the discharge was lawful cannot stand once its underpinning is stripped away. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

[3] The considerations which supported the Board's determination that the Leister, Kelley, and Burge were fired for engaging in protected activity are amply set out in the Board's brief.

> *ion, Local 662,* v. *NLRB,* 112 U.S. App. D.C. 323, 325-326, 302 F. 2d 908, 910-911 (1962), cert. denied, 371 U.S. 827. Clearly, an employer also violates the Act by refusing to reinstate unfair labor practice strikers to their former or equivalent positions upon their unconditional demand, even if he must discharge replacements to do so. *Mastro Plastics* v. *NLRB,* 350 U.S. 270, 278 (1956). Accord: *General Drivers & Helpers Union, Local 662 (Rice Lake Creamery Co.)* v. *NLRB,* 112 U.S. App. D.C. 323, 326, 302 F. 2d 908, 911 (1962), cert. denied, 371 U.S. 827; *NLRB* v. *Stilley Plywood Co., Inc.,* 199 F. 2d 319, 321 (C.A. 4, 1952), cert. denied, 344 U.S. 933; *NLRB* v. *Poultrymen's Service Corp.,* 138 F. 2d 204, 210 (C.A. 3, 1943); *Rapid Roller Co.* v. *NLRB,* 126 F. 2d 452, 460 (C.A. 7, 1942), cert. denied, 317 U.S. 650."

Of course, the Union's October 20th demand for reinstatement was unconditional. The Union said (G.C. Ex 5 A. 949):

> "All of your employees who are presently protesting your unfair labor practice hereby unconditionally offer to return to work as of Thursday, October 21, 1965. Mr. John Beatty or Mr. Martin Bacon will contact your office for starting time of each worker at 11 a.m. Thursday, October 21."

And it therefore entitled all the employees to immediate reinstatement, and, since the employer refused that, back pay for the period between the employer's unlawful refusal to reinstate the seven dischargees until the end of the strike. That principle is well settled, and is not affected by the fact that the Union insisted that *all* the strikers be returned to work. *Cactus Petroleum, Inc.,* 134 NLRB 1254 (1961), *enforcement denied on other grounds,* 355 F. 2d 755 (5th Cir. 1966) is a recent Board decision illustrating the state of the law. There, the Board wrote (134 NLRB at 1260-1261):

"The Trial Examiner found that the strike, which began on July 7, 1960, was for the purpose of gaining recognition of a minority union, that such a strike is unprotected activity, and, therefore, that the discharge of the strikers did not violate the Act. We have found, however, that the Union was the majority representative when it demanded recognition, and that the Respondent unlawfully refused to bargain with the union on July 4, 1969, and thereafter. We further find that the strike was caused by the Respondent's unlawful refusal to bargain and hence it was an unfair labor practice strike. The strikers were, therefore, entitled to reinstatement upon their unconditional application, regardless of whether they had been replaced. Nor could the Respondent lawfully discharge them for their failure to appear for work during the strike.[10]

A group of strikers applied for reinstatement on July 11, 1960. Their applications were rejected, and, in fact, Covington told them when they denied his assertion that they had quit their jobs, "Well, if you have got to hear me say it, you are fired." Subsequently, five strikers made individual applications for reinstatement. None of the strikers have been reinstated. The Trial Examiner found that the Respondent was justified in rejecting these applications on the ground that ". . . it was understood that the [strikers'] offer was conditioned upon reinstatement of all the strikers. They were unwilling to accept the employment on individual basis despite the fact that some of them at least had been replaced." But the record shows that both the group and individual applications for reinstatement were made in unconditional terms, and, as unfair labor practice strikers, they were entitled to reinstatement upon their unconditional application, without regard to whether they had been replaced. Although, as stated,

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[10] *Ekco Products Company (Sta-Brite Division)*, 117 NLRB 137, 145.

> the requests for reinstatement were unconditional, there is testimony in the record that some of the strikers would not have returned to work unless all of them were reinstated. It is well established, however, that applications for reinstatement by unfair labor practice strikers are not made conditional merely by insistence that all be given their jobs back or none would return.[11]

The *Rice Lake Creamery* case which the Board followed in *Cactus Petrolum, supra* was affirmed by this Court. *General Drivers Local 662* v. *NLRB,* 112 U.S. App. D.C. 323, 302 F.2d 908 (1962). Accord, *Berger Polishing, Inc.* 147 NLRB 21, 39 (1964).

The principle upon which we rely is thus settled both before the Board in this Court. An employer may not convert an unconditional offer to return to work into a conditional one by picking out the strike leaders and "discharging" them without running afoul of the law—and if, as Beaver Brothers did, he engages in such conduct, he is liable for the pay employees lose because they remain on strike. It follows that the Board should have directed the Company to make the unfair labor practice strikers whole for the wages they lost when it responded to their demand for reinstatement by discharging seven employees.

CONCLUSION

For the reasons set forth above, we respectfully request that an order issue directing the Board to order the reinstatement of Beatty, Coudriet, Hoar, and Goss and back pay for the unfair labor practice strikers, or, in the al-

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[11] Fred Snow, et al d/b/a *Snow & Son,* 135 NLRB 709; *Rice Lake Creamery Company,* 131 NLRB 1270; *National Gas Company,* 99 NLRB 273; *Draper Corporation,* 52 NLRB 1477, 1479-80, reversed on other grounds 145 F.2d 199 (C.A. 4); *Rapid Roller Co.,* 33 NLRB 557, 586.

ternative, directing the Board to make findings of fact as required by *Thayer* and to issue an appropriate order based upon those findings.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,966

AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO.,

Intervenor.

No. 22,089

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO.,

Respondent.

ON PETITION TO REVIEW AND ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL BRIEF ON BEHALF OF THE COMPANY

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ON PETITION TO REVIEW AND ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL BRIEF FOR BEAVER BROTHERS BAKING CO., INC., FOLLOWING PROCEEDINGS PURSUANT TO REMAND

Counterstatement of the Issues After Proceedings Pursuant to Remand

1. Whether the Company's earlier arguments for a denial of enforcement of the Board's Order are given new validity in light of *NLRB* v. *Gissel Packing Co., Inc.*

2. Whether the Board's finding that the Company wrongfully refused to recognize and bargain with the Union is unsupported under *Gissel.*

3. Whether the Board's finding that the Company's conduct prevented a fair election may not be reasonably inferred from the evidence.

4. Whether the Board improperly premised its bargaining order on unfair labor practices which were unrelated to the representation campaign.

5. Whether the Board's Order is based on a denial of due process and is not entitled to enforcement.

6. Whether the Board failed to consider current conditions in deciding to enter a bargaining order.

Supplemental Statement of the Case

Proceedings Before This Court:

On May 23, 1968, the Board issued its initial Decision and Order in this matter. On May 24, 1968, the Union filed a petition for review in this Court. Thereafter, the parties submitted the following briefs: the Board filed a main brief, a reply brief and a supplemental reply brief; the Company filed a main brief and a supplemental brief as Respondent in No. 22,089, and a brief as Intervenor in No. 21,966; the Union filed a main brief in No. 21,966. The cases were scheduled to be argued on June 17, 1969. They were rescheduled for July 8, 1969, and then postponed indefinitely.

On August 1, 1969, the Board filed a Motion To Withdraw The Record To Reconsider Certain Issues Raised By The Supreme Court's Decision in *N.L.R.B.* v. *Gissel Packing Co., Inc.*[1] The Court granted the Board's motion on October 17, 1969. The Court's order provided "that the record herein be remanded to the Board for further proceedings in light of *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575."

Proceedings Before the Board On Remand:

On October 28, 1969, the Board issued a notice permitting the parties to file statements of position with regard to the application of *Gissel* to the case. The Company and General Counsel subsequently filed such statements.

On November 11, 1969, the Company filed a Motion To Remand To The Trial Examiner For The Purpose Of Reopening The Record To Adduce Additional Evidence, Make New Findings, And Reconsider His Prior Findings.

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[1] 395 U.S. 575, decided June 16, 1969.

General Counsel interposed a statement in opposition thereto.

On May 27, 1970, the Board issued its Supplemental Decision and Order, 183 NLRB No. 122. The Board affirmed its conclusions that the Company violated Sections 8(a)(1), (3) and (5) of the Act.[2] In a brief statement, the Board also denied the Company's motion to remand to the Trial Examiner.

Proceedings Before This Court Following Remand:

On June 10, 1970, pursuant to the Court's order of October 17, 1969, the Board returned to this Court the certified index to the record supplemented by the proceedings had on remand, and again moved for enforcement of its order.

The Company's Motion For Leave To Adduce Additional Evidence, filed July 22, 1970, was denied by order of the Court on October 13, 1970.

This brief is submitted in opposition to the Board's Motion for Enforcement.

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[2] The Board's Supplemental Decision and Order does not treat directly with issues involved in the Union's petition for review (No. 21,966).

POINT I

The Company's Earlier Arguments Opposing the Imposition of a Bargaining Order Remain Valid.

The Board's bargaining order was without support in law prior to *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). Neither *Gissel* nor the Board's Supplemental Decision correct the infirmities in the Board's initial Decision.[3] The arguments made in our main brief continue to be valid.[4] In this Point we recapitulate those arguments and comment as to their applicability in light of the Board's Supplemental Decision and Order and in light of *Gissel*.

A. *"Point I: This Court Should Scrutinize The Entire Record With Care."* (R.B. 6-9).[5]

We urged in our main brief that the Court scrutinize the entire record with care because the Board and its Trial

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[3] The Supplemental Decision and Order added to the original Decision and Order, but did not replace it. "The remand by . . . this Court did not vacate the previous order of the Board. . . ." *Thrift Drug Company of Pennsylvania* v. *NLRB*, —— F.2d ——, 75 LRRM 2431 (6th Cir., October 8, 1970). The Board, itself, has here incorporated the provisions of its prior determination in the Supplemental Decision and Order. It states: "We . . ., having reconsidered the matter, affirm our original finding and order in this respect for the reasons stated below." Supplemental Decision and Order (Supplemental Appendix) 2.

[4] However, Points VI and VIII in our main brief may be disregarded by the Court since, under *Gissel*, the Company's good faith is no longer a relevant consideration.

[5] Quotations are from point headings in the Company's (Respondent's) main brief ("R.B."). "A." where used herein, refers to the Appendix previously filed in this matter. Whenever a semicolon appears, references preceding it are to the decisions of the Board or the Trial Examiner; those following are to supporting evidence. "S.A." refers to the Supplemental Appendix, contained in the Board's (Petitioner's) Supplemental Brief ("P.S.B."). References to the official transcript not contained in the Appendix are designated "Tr."

Examiner reached conflicting conclusions on the most crucial issues. Two of the issues on which the Trial Examiner and the Board continue to differ are:

1. **Whether substantial evidence supports a finding that all of the authorization cards were tainted.**

The Trial Examiner answered this question in the affirmative (A. 1050). The Board continues to take a contrary view, stating that, "the employees' desires as expressed through the authorization cards are a more reliable measure of their stand on the issue of representation" than would be an election (S.A.3).

2. **Whether the Company engaged in only minimal independent unfair labor practices.**

The Trial Examiner found that the Company's independent 8(a)(1) violations were not widespread or pervasive (A. 1048). The Board persists in a contrary view. It finds "Respondent's campaign to defeat the Union's organizational efforts consisted . . . of serious acts of interference, restraint, and coercion against its employees in violation of Section 8(a)(1) . . . ." (S.A.3).

B. *"Point II: The Board Errs In Failing To Affirm The Trial Examiner's Finding That The Union's Coercive Tactics Tainted And Invalidated All Of The Authorization Cards."* (R.B. 10-25).

The Company continues to urge that the Board erred in failing to affirm the Trial Examiner's finding that the Union's coercive tactics tainted and invalidated all the authorization cards.

The decision in *Gissel Packing Company* lends support to our contention. In *Gissel*, the Court approved the Board's "current practice." That practice requires that, "A bargaining order will not issue . . . if the Union obtained

cards through misrepresentation *or coercion* . . . ." 395 U.S. at 592 (Emphasis added).[6] Here, the Trial Examiner found coercion (A. 1050). The Board, however, says this finding is "questionable" (A. 1059).[7]

C. *"Point III: The Refusal To Permit The Company To Cross-Examine Witnesses Was A Denial Of Due Process."* (R.B. 26-36).

1. The Company reasserts its position.

The Company strenuously urges that it was denied due process by being precluded from cross-examining witnesses. This objection takes on added significance in light of *Gissel.*

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[6] The Court also stated:

> "We could be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses . . . by union organizers . . . ." *Id.* at 604.

[7] The Board does not outrightly deny that there was coercion. Instead, it avoids the issue by saying: "There is not a scintilla of evidence that the Union officials Pointak or Bacon were aware of or encouraged any of the coercive tactics allegedly used by employee solicitors" (A. 1054). With the ease of Alexander severing the gordian knot, the Board thus eliminates any agency relationship between Union officials and their functionaries engaging in coercive conduct. However, the lack of the Union's knowledge and encouragement does not vitiate the effect of coercive conduct on employees.

Unabashedly, the Board continues, "And even if it were assumed that the aforementioned five cards were coercively obtained, it is clear the Union had majority status without counting these five cards" (A. 1054). If five instances of blatant coercion are insufficient to taint all the cards, how can a similar number of alleged employer unfair labor practices, directed against a small number of employees, be considered so pervasive as to necessitate a bargaining order? The Board does not explain this inconsistency. Short of metaphysical argument, it would be at pains to do so.

2. The decision in Gissel warrants critical evaluation by this Court of the cards and their solicitation.

In *Gissel,* the Supreme Court gave limited approval to the Board's *Cumberland* rule.[8]

It stated that the cards before it:

> "*unambiguously authorized* the Union to represent the signing employee for collective bargaining purposes; *there was no reference to elections.*" 395 U.S. at 583, n. 4 (Emphasis added).

The Court also noted the extensive consideration accorded testimony concerning card solicitation. It found that the Trial Examiner (in General Steel) "considered the allegations of misrepresentation at length. . . ." *Id.* at 584. The Court stated:

> "[A]fter hearing testimony from over 100 employees and applying the traditional Board approach . . . [the Examiner] concluded that 'all of these employees not only intended, but were fully aware, that they were designating the Union as their representative.'" *Id.* at 606.

The Court thereupon held that "the *Cumberland Shoe* doctrine is an adequate rule under the Act for assuring employee free choice." *Ibid.* However, it warned that its approval was limited to unambiguous cards:

> "And we reiterate that nothing we say here indicates our approval of the *Cumberland Shoe* rule when applied to *ambiguous, dual-purpose cards.*" *Id.* at 609 (Emphasis added).

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[8] *Cumberland Shoe Corp.,* 144 NLRB 1268 (1963).

In the instant case, by validating the card, the Board has paid only lip-service to *Gissel*. As we will show, the card here is highly ambiguous and misleading and does not, on its face, signify a *clear* authorization intent. Additionally, the Trial Examiner failed to permit evidence of misrepresentations to be fully developed.

3. The ambiguous, dual-purpose card in issue is an insufficient authorization upon which to base a bargaining order.

The card used here carried the following statement (A. 939-46):

Certificate of Authority

NATIONAL and/or STATE LABOR RELATIONS BOARD

Date .....

I, the undersigned employee of the .....

of ....., ..., hereby
(State) (State)

authorize the American Bakery and Confectionery Workers' International Union, AFL-CIO, Local ....., as my exclusive bargaining agent respective to wages, hours and working conditions and with authority to file a petition for bargaining relative to union security between myself and the above-mentioned company.

Name .....

.....

Street City State

The questions raised by the card's form and language are so numerous and so critical as to deny its validity, even without taking into consideration the misleading and coercive statements made by union adherents in the course of solicitation.

a. *The Board recognized that the card was intended for more than one purpose.*

The Board stated:

> "It should be noted that the Union authorization cards signed by employees *not only authorized* the Union to bargain with Respondent as to hours, wages and working conditions, *but also authorized the Union 'to petition for union security for the employees of the employer.'*" (A. 1054, n. 5; Emphasis added).

The Board's quotation is inaccurate. The card authorizes the Union to "petition for bargaining relative to union security between myself and the above-mentioned company" (A. 939-46). If the Board was confused as to the language of the card, it is not unreasonable to suppose that employees were also confused.

b. *The card is an authorization to petition for a union-shop referendum.*

The card contains language which invests the Union with authority to petition for a now non-existent union-shop referendum. The signer authorizes the Union "to file a petition for bargaining relative to union security between myself and the . . . company."

Section 9(e)(1) of the Act as originally enacted in 1947 sanctioned a union-shop referendum. The section provided:

> "Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a) of a petition alleging that 30 per centum or more of the employees . . . desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employ-

> ment . . . the Board shall . . . take a secret ballot of such employees, and shall certify the results. . . ."[9]

Cards such as the one used here were a typical means of proving employee support for a 9(e)(1) petition. As stated by Section 101.22 of the Board's Statement of Procedure, Series 6, as amended (March 1, 1951), 27 LRRM 3110:

> "The evidence of authorization submitted by the petition(er) is usually in the form of cards signed by individual employees authorizing or expressing a desire for petitioner to enter into such an agreement. . . ."

The card's caption is further evidence that the card was intended to be used in support of a petition for a union-shop referendum. The caption reads, "National and/or State Labor Relations Board." It was the position of some states that where a state's regulation concerning union security was stricter than that of the federal government, state law would control.[10] Moreover, the states sometimes required that their own referendum be conducted. New Hampshire, for example, required a two-thirds majority in a referendum conducted under the supervision of the labor

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[9] National Labor Relations Act, as amended (61 Stat. 136, § 9(e)(1), 29 U.S.C. § 159(e)(1) (1947)). If a union prevailed in the referendum, the Board would issue a "union security authorization certificate provided for in 9(e) of the Act . . . ." *Chisholm-Ryder Co., Inc.*, 96 NLRB 1134 (1951). The certificate would permit the commencement of negotiations for a union shop. (We note, in passing, that the card in issue is entitled a "Certificate of Authority.")

[10] National Labor Relations Act, as amended (61 Stat. 136, § 14 (b), 29 U.S.C. § 164(b) (1947)). See "Union—Security Elections: NLRA—State Overlap," 21 LRRM 68, 69-70 (1948), where the Attorney General of New Hampshire expressed this opinion. See also *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301 (1949).

commissioner or his representative,[11] whereas the Board required a simple majority in a referendum conducted under its own auspices.[12] This federal-state overlap required that a petitioner institute two referendum proceedings, one before the Board and one before the appropriate state agency.[13] The card here was designed for these purposes.

c. *The Company's attempt to cross-examine concerning statements made by the solicitors relative to the card's ambiguity was thwarted.*

What sort of petition were employees told they were authorizing? Were they told that by executing the card they were authorizing the union to file a petition for a representation election? Were they told that by executing the card they were authorizing a union-shop referendum?

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[11] N.H.R.L. 1942, ch. 212, § 21-a, amended L. 1947, ch. 195, repealed L. 1949, ch. 57.

Wisconsin also required a two-thirds majority and that the referendum be conducted by the Wisconsin Employment Relations Board. Wisc. Stat. Ann., tit. 13, § 111.06 (1)(c)(1) (1957), as amended.

Colorado required a three-fourths majority in a referendum conducted by the Industrial Commissioner of the state. Colo. Rev. Stat., ch. 80, art. 4, § 80-4-6(1)(d) (1969 Supp.).

Kansas required a majority vote of the employees. K.S.A., ch. 44, art. 8, § 44-809 (4) (1964).

[12] NLRB Release R-48, 21 LRRM 60-61 (1948).

[13] A news item of the time reported:

"[T]he Textile Workers Union of America (CIO) won elections recently in 27 textile plants in New Hampshire. In every case the union had to vote once under the Federal law and once under the New Hampshire law." 21 LRRM 68, 69 (1948).

Were they advised that half the card was meaningless and should be disregarded?[14] We do not know, because when counsel for the Company sought to elicit testimony concerning card solicitation, he was prevented from doing so (A. 847).

4. This Court's decisions warrant a denial of enforcement of the Board's Order.

The Supreme Court in *Gissel*,[15] and this Court in *Joy Silk Mills* v. *NLRB*, 87 U.S. App. D.C. 360, 371, 185 F.2d 732, 743, *cert. denied*, 341 U.S. 914 (1950), decry any reliance on card signers' testimony of subjective intent to counteract the signing of cards. These decisions, however, do not cloak abusive solicitation practices with the mantle of judicial approval. Specifically:

> "[The decisions] should not be taken to license the use of misleading authorization cards. If such cards are to be substituted for a secret ballot, their terms ought to be unmistakable."[16]

In *Retail Store Employees Union* v. *NLRB (Kinter Brothers, Inc.)*, —— U.S. App. D.C. ——, 419 F.2d 329, 334 (1969), the Court, holding that the cards in issue were "plain and unambiguous," stated approvingly:

> "The starting point for our inquiry is *the cards, themselves, which were forthright in stating their purpose*

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[14] In 1951, the federal referendum procedure for achieving union-shop status was abolished. P.L. 189, 82nd Cong., 1st Sess., 65 Stat. 601 (1951). Accordingly, when the cards herein were solicited (1965), such a referendum could not be obtained.

[15] 395 U.S. at 608.

[16] *International Union of Electrical Workers* v. *NLRB (SNC Mfg. Co.)*, 122 U.S. App. D.C. 145, 148, 352 F.2d 361, 364, *cert. denied*, 382 U.S. 902 (1965), concurring opinion of Judge Burger.

> to authorize the Union as representative and collective bargaining agent. *The only statement on the card, and one that appears on its face, is this short, clear and direct authorization*:
>
> 'I, the undersigned, an employee of ..... hereby authorize . . . [the Union] to represent me for the purpose of collective bargaining.'" (Emphasis added).

Where cards have fallen short of this standard, there has been extensive inquiry into the circumstances of signing.

In *Amalgamated Clothing Workers of America* v. *NLRB* (*Sagamore Shirt Co.*), 124 U.S. App. D.C. 365, 365 F.2d 898 (1966), this Court refused to consider ambiguous cards as conclusive of union authorization since there was evidence of improper solicitation. Deeming the cards "anything but clear," the Court stated:

> "Where the union does not provide its organizers with cards clearly informing employees of their purpose, the union must face the possibility that the effectiveness of the cards may be *undercut by parol testimony* showing that the purpose presented to the employees was that of securing an election and that the purpose of union authorization was not mentioned." 124 U.S. App. D.C. at 374, 365 F.2d at 907 (Emphasis added).[17]

In *International Union, United A.A. & A. Imp. Workers* v. *NLRB (Aero Corp.)*, 124 U.S. App. D.C. 215, 363 F.2d 702, *cert. denied*, 385 U.S. 973 (1966), this Court enforced

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[17] As the Board has recognized, "where the purported authorization is questionable on its face . . . what employees are told assumes greater importance. . . ." *Morris & Associates, Inc.*, 138 NLRB 1160, 1177 (1962).

a bargaining order only after ascertaining that the employer had been given the opportunity to conduct vital cross-examination as to misrepresentations. The Court noted that:

> "[T]*he Company has been permitted to inquire as to the representations made at the times the cards were distributed, i.e., to question whether there were misrepresentations.*" 124 U.S. App. D.C. at 218, 363 F.2d at 705 (Emphasis added).[13]

In the case at bar, the Company was denied this fundamental right. Counsel was precluded from obtaining answers to the following questions:

"Do you recall where you got the card from?" (A. 847).

"Do you recall who gave you the card?" (A. 847).

"Do you recall whether anything was said when you were given the card?" (A. 847).

"Do you recall the circumstances of your signing the card?" (A. 847).

None of these questions called for a subjective answer. The refusal to permit answers was prejudicial. The card's ambiguity required such inquiry. Accordingly, the Company submits that the Board's order is defective and should not be enforced. Testimony undercutting the validity of the card could have been adduced in the instant matter had not the Examiner, with Board approval, cut short the Company's examination.

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[13] See also *International Union, United A.A. & A. Imp. Workers* v. *NLRB (Preston Products Company)*, 129 U.S. App. D.C. 196, 202, 392 F.2d 801, 807, *cert. denied* 392 U.S. 906 (1968); *Amalgamated Clothing Workers of America* v. *NLRB (Hamburg Shirt Company)*, 125 U.S. App. D.C. 275, 280, 371 F.2d 740, 745 (1966).

Here, the card lacks the requisite clarity to be reliable. It is not the type approved by *Gissel*. Nor is it the type which plainly authorizes two alternative, lawful actions by a union. The card is vague and misleading. It presumes to authorize what it cannot—a union-shop referendum. There is no "clear language" by which a signer may be bound.

This infirmity, considered with the refusal to permit the Company to conduct vital, relevant examination, is fatal to the Board's case for enforcement of its order.

D. *"Point IV: The Board's Reliance Upon Evidence Of Strike Participation To Find A Violation Of Section 8(a)(5) Was Prejudicial."* (R.B. 37-42).

The Company continues to urge that it was prejudicial for the Board to rely upon evidence of strike participation in finding a violation of Section 8(a)(5).

E. *"Point V: The Board Improperly Precluded The Company From Eliciting Evidence Establishing That A Majority Of Employees Had Not Participated In The Strike."* (R.B. 42-43).

The Company continues to urge that it was prejudicial for the Board to preclude the Company from eliciting evidence to establish that a majority of employees had not participated in the strike.[19]

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[19] This evidence would establish the Company's knowledge that a majority of employees did not support the Union.

a bargaining order only after ascertaining that the employer had been given the opportunity to conduct vital cross-examination as to misrepresentations. The Court noted that:

> "*[T]he Company has been permitted to inquire as to the representations made at the times the cards were distributed, i.e., to question whether there were misrepresentations.*" 124 U.S. App. D.C. at 218, 363 F.2d at 705 (Emphasis added).[18]

In the case at bar, the Company was denied this fundamental right. Counsel was precluded from obtaining answers to the following questions:

> "Do you recall where you got the card from?" (A. 847).
>
> "Do you recall who gave you the card?" (A. 847).
>
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F. ***"Point VII: The Company Did Not Unlawfully Withhold Recognition On September 18 Since The Union Did Not Represent A Majority Of The Employees In The Requested Unit."*** **(R.B. 58-63).**

The Company maintains that it did not unlawfully withhold recognition on September 18, 1965, since the Union did not then represent a majority of the employees in the requested unit.

G. ***"Point IX: Substantial Evidence Does Not Support The Board's Finding That The Union Attained Majority Status In The Appropriate Unit At Any Time."*** **(R.B. 68-80).**

The Company continues to urge that substantial evidence is lacking to support the Board's finding that the Union attained majority status in the appropriate unit at any time.

H. ***"Point X: Under The Circumstances Of This Case, A Bargaining Order Is An Inappropriate Remedy."*** **(R.B. 81-87).**

In view of *Gissel* and for the reasons set forth herein and in the Company's main brief, the Company continues to urge that a bargaining order is inappropriate under the circumstances of this case.

POINT II

The Company Complied With the Board's Current Practice As Approved In Gissel.

In *Gissel*, the Supreme Court approved the Board's "current practice" regarding an employer's right to insist upon an election. The Court stated:

> "[T]he Board asks us to approve its current practice, which is briefly as follows. When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, unless he has knowledge independently of the cards that the union has a majority, decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under § 9(c)(1)(B)." 395 U.S. at 591.

The Company complied with the "current practice" in all respects.

A. *The Union's Demands For Recognition Were Clearly And Unequivocally Refused In Accordance With Gissel.*

The Trial Examiner found that after the first Union meeting on September 18, 1965, Peter Pointak, the Union's vice president, telephoned Guy Beaver, the Company's president, and requested a meeting to obtain recognition. The request was refused (A. 1014; 657-58).[20]

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[20] The Board erroneously found that Beaver's "only reply" to this request was "we don't recognize any unions" (A. 1056). It

On September 21, employees Beatty and Zimmerman met with the Company's general manager, William Stuckey, and attorney, Robert Moss. Again recognition was demanded, and again it was refused. Beatty testified, "Mr. Moss. . . stated that we don't believe you represent the majority and we see no reason for a meeting at this time" (A. 171).[21] According to Beatty, "he gave the answer quite a few times" (A. 171).

The evidence concerning the third demand for recognition, just prior to the strike, also shows that the Company had made its position and supporting reasons clear. Bacon testified that he was told by the girl who returned his telephone call to Beaver "that the position that they [the Company] had taken, still they were not going to recognize the Union. . . ." (A. 1015; 52). The Company's position, he was told, remained unchanged.

It can be seen, therefore, that the Company promptly and clearly notified the Union that it was declining the re-

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conveniently ignores its Trial Examiner's summary of Beaver's contrary testimony which was not discredited (A. 1014; 658):

> "Beaver testified that he told Pointak that he would ask for an election, and that he preferred to have him discuss it with his legal counsel, whom he identified as Robert Moss, and gave him Moss' telephone number and asked that further contacts should be made through Moss' law firm."

Beaver testified that he immediately wrote down what had been said in this telephone conversation (A. 658).

[21] This testimony was substantially corroborated by general manager Stuckey. He stated that Moss replied, "I doubt that Mr. Bacon represents the majority of uncoerced employees" (A. 512).

quests for recognition. It went further than required by *Gissel*, since it also stated its reasons for this position.[23]

B. *The Board's Reliance On The Company's Independent Knowledge Of Majority Status Was Improper.*

The Company's representatives never examined the authorization cards allegedly offered by the Union. The Board, therefore, in an effort to find the Company guilty of a refusal to bargain, relies upon the alleged independent knowledge of Union support gleaned from picket line participation (A. 1055).[25]

As the Company stated in its main brief (R.B. 37-42), the Board's reliance is improper. The hearing was explicitly closed by the Examiner on the basis that there would be no such reliance (A. 1026, n. 32).

C. *The Company Sought To Resolve The Representation Question By An Election.*

The Company did not simply refuse recognition and then sit back and await the Union's next move.[24] On Sep-

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[23] The Supreme Court held that "an employer is not obligated to accept a card check as proof of majority status. . . ." 395 U.S. at 609. Indeed:

> "He [the employer] need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment.'" *Id.* at 594.

This language is to be contrasted with the Board's critical "summary" of the Company's response to the requests for recognition. The Board maintains that the Company's denials of recognition were made without reason (A. 1056). Not only is this irrelevant under *Gissel*, it is untrue, as the above discussion makes clear. The Board has not seen fit to renounce this wanton accusation in its Supplemental Decision, and presumably still relies upon it as a premise for its bargaining order.

[25] The Board has not disavowed this reliance in its Supplemental Decision.

[24] The Company's willingness to participate in a representation proceeding should be contrasted with the employer's conduct in *Wilder Mfg. Co., Inc.*, 185 NLRB No. 76, 75 LRRM 1023, 1024 (1970), where the Board issued a bargaining order, citing the employer's failure to file a petition and its "unwillingness" to participate in a representation proceeding.

tember 18, Beaver told Pointak that "we would petition the Labor Board for an election" (A. 1014; 658).

The Company filed such a petition on September 21, 1965 (6-RM-286) (A. 1047; 1010-A). A hearing was commenced on October 19, 1965, but processing of the representation matter ceased upon the filing of the complaints herein (A. 1015, n. 11; 961).

From the foregoing, it may be seen that the Company complied with the *Gissel* requirements:

(1) It promptly and clearly notified the Union that it would not grant recognition based solely on authorization cards;

(2) It had no independent knowledge of the Union's majority; and,

(3) It initiated Board election proceedings to resolve the representation question.

Notwithstanding the Company's compliance with these requirements, the Board refused to direct an election.

POINT III

The Board Improperly Premised Its Bargaining Order On Unfair Labor Practices Which Were Unrelated to the Representation Campaign.

The Board, in its Supplemental Decision and Order, concluded as follows:

> "We are convinced after a careful reexamination of the facts herein in the light of the standards set forth in the Supreme Court's opinion in *Gissel* that a bargaining order is warranted. The Respondent's campaign to defeat the Union's organizational efforts consisted

> not only of serious acts of interference, restraint, and coercion against its employees in violation of Section 8(a)(1), *but included the discriminatory discharge of three employees* in violation of Section 8(a)(3)." (S.A. 3; Emphasis added).

The Board's initial decision, prior to *Gissel*, did not mention the discharges as a basis for issuing a bargaining order. The emphasis on the discharges is presumably a result of the Board's reexamination of the facts in light of *Gissel*. The Board has not, however, been faithful to the teachings of *Gissel*.

The Supreme Court stated, clearly and unequivocally, that:

> "A bargaining order will not issue, of course, . . . if the employer's unfair labor practices are unrelated generally to the representation campaign." 395 U.S. at 592.

The assertedly discriminatory discharges on which the Board relies for its bargaining order were wholly unrelated to the representation campaign. The Union's representation campaign commenced sometime in mid-September, 1965. A meeting was held on September 18, at which time authorization cards were signed. After the meeting the Union requested the Company to recognize it as bargaining agent for the employees. The request was denied. The Union twice renewed its request three days later. The requests were again denied and the Union struck.

During the course of the strike seven employees engaged in such serious misconduct that the Company was constrained to terminate their employment on October 20, 1965, when they requested reinstatement.

Thus, more than a month after the Union began its efforts to organize the employees and succeeded in signing up a claimed majority, the Company discharged some employees.[25]

Clearly, the Company's action was wholly unrelated to the Union's representation campaign. The Board, itself, acknowledged that the campaign was over by the time the strike commenced when it stated that:

> ". . . during the period of the organizational effort Respondent engaged in unlawful conduct in violation of Section 8(a)(1). . . ." (A. 1059).

There was no finding of any Section 8(a)(1) conduct beyond September 21. Thus, by implication, the organizing effort ended at that time.

In any event, the discharges were not a response to the Union's efforts to attain majority status. Had the Company intended to thwart the Union's drive it would not have waited until a month after the Union had assertedly succeeded in signing up a majority of the employees. On the contrary, it would have discharged them during the organizing campaign.

The most that can be said of the Company's action in ordering the discharges is that it improperly assessed the degree of misconduct of three of the seven strikers.[26]

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[25] In fact, the discharges occurred in October because that was when the Union requested reinstatement on behalf of all the employees. It was then that the Company evaluated the conduct of the strikers and concluded that the seven had acted so heinously that they were not entitled to reinstatement. This is proof positive that the discharges were solely an outgrowth of the Union's unchecked reign of coercion and destruction. Had the Union requested reinstatement at some later date after the organizing had ended, the employees would have been terminated at that time.

[26] In its brief as Intervenor in No. 21,966, the Company has argued that the Board incorrectly found that the discharges were discriminatory.

This, however, does not disturb the operative fact that at the time of the discharges, the Company had a reasonable basis for believing that the three men had engaged in such misconduct as to warrant termination.[27] In any event, the Company's error in evaluating this misconduct is surely not the type of unfair labor practice which the Court had in mind in *Gissel* as warranting a bargaining order.

In this connection, there is an absence of any finding by the Trial Examiner that any of the three discharges was for the purpose of defeating the Union's organizational efforts.[28] His finding was that the discharges violated Section 8(a)(3) because there was insufficient evidence of misconduct warranting discharge (A. 1034-36).

These wrongful discharges must be considered in the context of the remaining four which were upheld by the Board. If the three discharges were for the purpose of destroying organizational efforts, how does the Board reconcile the fact that it upheld the discharge of four other em-

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[27] The Trial Examiner stated:

> "The evidence pertaining to the alleged misconduct of the discharged employees shows that management either witnessed the incident or received a report of it." (A. 1031).

[28] There was, for instance, no nexus found between the assertedly wrongful discharges and the protracted strike. The Examiner concluded: "I am persuaded by the evidence that the discriminatory discharges were not the cause of the prolonged strike" (A. 1037).

In his Supplemental Decision, the Examiner did not even mention the discharges when discussing the alleged refusal to bargain (A. 1047-49). Similarly, in the Board's original Decision and Order, the discharges were considered separate and apart from other alleged unlawful conduct (A. 1060). They were discussed only in connection with a back pay award, which the Board refused to grant to all the strikers (A. 1060).

ployees because of their misconduct (A. 1060, n. 13)? The Board found that certain acts of misconduct were not of sufficient gravity to justify terminating three employees. Does the Board seriously contend that this finding, *ipso facto*, becomes a finding that the men were discharged for the purpose of defeating the Union's completed organizational efforts?

The Company submits that the Board should not be permitted to cite the discharges in support of its bargaining order. The issue litigated, and the evidence weighed, was whether the acts of misconduct warranted dismissal. The discharges were not considered in relation to an alleged effort to destroy the Union. It is too late in the day to dredge up the discharges for this purpose.

POINT IV

The Company Did Not Engage In Serious Unfair Labor Practices.

A. *Gissel Created Gradations Of Unfair Labor Practices.*

In *Gissel*, for the first time, the Supreme Court established gradations of unfair labor practices. Two major categories were discussed: (1) "serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election," 395 U.S. at 594; and, (2) "minor or less extensive" unfair labor practices. *Id.* at 615. The first type would support a bargaining order. The second type, the Court reasoned, could be remedied by a conventional cease and desist order and would not justify a bargaining order. *Ibid.*[29]

[29] The Court suggested that there might be a third type of unfair labor practice, the "outrageous," which in "exceptional" cases would always result in a bargaining order. *Id.* at 613. This type was

The Supreme Court's analysis has posed a new problem for reviewing courts. They must now decide whether the Board has made the proper classification of various unfair labor practices in each case. While reviewing courts should accord the Board's choice a special respect, they cannot abdicate their responsibility for independent review. Thus, where they find, contrary to the Board, that minor unfair labor practices have occurred, they must deny enforcement of bargaining orders.

As we will show, the alleged unfair labor practices here were indeed minor.

B. *The Company Did Not Commit Any Serious Acts Of Interference, Restraint And Coercion.*

The Board was "convinced after a careful examination of the facts" that a bargaining order was warranted. The Board's conclusion was premised on a finding that the Company committed "serious acts of interference, restraint and coercion against its employees in violation of Section 8(a)(1) . . . ." (S.A. 3).

The serious acts of interference which the Board relies upon are presumably the same acts which it found, in disagreement with its Trial Examiner, sufficient "to warrant the inference that Respondent's refusal to recognize the Union was made in bad faith" (A. 1057). The acts which the Board characterizes as "serious" involved six employees, two of whom were transport drivers and therefore not a

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suggested by Chief Judge Haynsworth in *dictum* in *NLRB* v. *S.S. Logan Packing Company*, 386 F.2d 562 (4th Cir. 1967). The Supreme Court's discussion of this dictum was itself dictum, since it noted: "The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases. . . ." *Id.* at 614. See Lewis, *Gissel Packing: Was The Supreme Court Right?*, 56 A.B.A.J. 877, 878, n. 5 (1970).

part of the unit found appropriate by the Board (A. 1058-59; 1053, n. 1).

The Supreme Court in *Gissel* stated that if unfair labor practices are "unrelated generally to the representation campaign," they cannot be used to support a bargaining order. 395 U.S. at 592. The Company submits that any unfair labor practices affecting two non-unit employees—Kelley and Earnest—were unrelated generally to the campaign. Accordingly, even if the Company's conduct towards the two men was unlawful, it may not be used by the Board as justification for a bargaining order. With respect to the four unit employees, the alleged acts were no more than innocuous conversations.

1. The Zimmerman conversation.

The Board found that after the union meeting on September 18, a foreman, Robert O'Donnell, had a conversation with Jack Zimmerman, a production employee, about the Union.[20]

The Board, in desperation to tarnish the conversation with the brush of coercion, relies upon an event which occurred beyond the 10(b) period. Thus, over the Company's objection, Zimmerman testified concerning a conversation he had with Company officials in the summer of 1965 in which he was allegedly told that he "wouldn't be able to get as many hours and as much money with the Union" (A. 1058; 132). Since the bakery employees were working a considerable amount of overtime and unions ordinarily prefer to see the work spread among many members, the Company's comment would be nothing more than a factual statement.

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[20] O'Donnell denied having any conversation with Zimmerman about his union activities (A. 446).

Even if there were some implied threat in the Company's statement in the summer of 1965, it cannot be the basis for an 8(a)(1) finding. General Counsel stated that the evidence "is background; we are not alleging it as 8(a)(1)" (A. 130). The Board apparently is not limited by the statute or by its own trial counsel's statement. The Board states that "O'Donnell implied that if the Union came in Zimmerman would not get as many hours and as much money" (A. 1058). The Board's *entire* basis for finding that O'Donnell implied this is Zimmerman's statement that O'Donnell said "you know what happened before" (A. 132). We will never know to what O'Donnell was referring. According to Zimmerman, O'Donnell said nothing more. Zimmerman did not venture his own explanation and neither did the Board. A violation of Section 8(a)(1) and a bargaining order must rest on clearer talk. Surely, this vague conversation cannot be classified as constituting a major unfair labor practice.

2. The Leister conversation.

Foreman Lash allegedly asked Floyd Leister whether he knew about the union activity "going around 'here'" (A. 1058). Leister said he did not. The Board also premised its 8(a)(1) finding on a subsequent conversation (involving plant manager Gaudreau), when Lash asked Leister "what he thought" (A. 1058; 198). The question fails to reveal any coercive inquiry about union activity. The answer yields nothing more. Leister replied: "Well, I don't know" (A. 198).[21]

In the same conversation, according to Floyd Leister, Gaudreau stated, "I hope you boys don't strike because

[21] Leister testified: "I didn't say anything because, well, in the first place the man didn't actually say what he was referring to" (A. 203).

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somebody will be sorry for it" (A. 1058; 199). The Company submits that even if Leister's testimony can be credited,[22] the statement was not coercive. The fact that "somebody" later becomes "sorry" about a strike does not make the statement unlawful. It has often been stated that no one gains by a strike. How can it be said that "somebody (the employees or the Company) may later be sorry" constitutes an unlawful statement?

Regardless of its import, it surely cannot be classified as a major unfair labor practice.

3. The Moore conversation.

A production employee, Donald Moore, testified that Gaudreau asked him if he had heard rumors of union activity and whether he had signed a card (A. 277). The co-

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[22] Gaudreau testified: "There was no mention made of any strike. . . ." (A. 476). Gaudreau's account of the conversation was truthful and complete, and should have been credited:

> "Floyd came into my office that particular day. I can remember this date. And myself and our engineer, who is Russ Lash, our engineer was sitting there. And he come up and we were wondering why, so anyway the conversation opened that he was going to attend a meeting, and he told us that—both Russ Lash and myself, that he had signed the card and he said I might as well attend this meeting because I'd lose my job anyway, and I might as well go ahead. And I also recall that both Russ Lash and I both said no, you wouldn't lose your job because you signed the card. So he went on insisting that he would lose his job because he signed the card, and we said no, you are not going to lose your job because you signed the card; just stay at work." (A. 475-76).

Furthermore, the context of the conversation evidences it was not initiated by Gaudreau but was voluntarily initiated and pursued by Leister. In such context, with the give and take of a casual conversation, Gaudreau's response would have been a normal one prompted by Leister's comments and concern.

ercive aspect of this conversation is non-existent.[23] Surely, this is not a major unfair labor practice. There was no promise or threat in the inquiry.

4. The Smith conversation.

The Board's final 8(a)(1) finding can be quoted in full:

> "Another supervisor, Knapp, walking by the work station of employee Seth Smith, asked whether he had heard rumors about a union. Smith replied he had not." (A. 1059).

The above conversations, even assuming their validity, were not coercive. Once again, it cannot be said that any major unfair labor practices were committed.

C. *The Board's Findings Of Unfair Labor Practices Are Legally Unsupported And Not Serious Enough To Support A Bargaining Order.*

The incidents relied upon by the Board do not rise to the level of unfair labor practices. The remarks were not inherently coercive.

The inquiries of Zimmerman, Leister and Smith were by low-level supervisors, O'Donnell, Lash and Knapp.[24] Moreover, "there is no indication that any of these three appeared as a formidable personality who was held in awe by any of the employees", *Schwartzenbach-Huber Co.* v. *NLRB*, 408 F.2d 236, 251 (2d Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

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[23] In evaluating this conversation, the Board completely ignored the Union's coercive conduct towards Moore. He was threatened that if he crossed the picket line and the Union got in he would lose his job (A. 471).

[24] Foreman O'Donnell was not even Zimmerman's immediate superior (A. 127). Leister testified that the maintenance department was comprised of only three individuals, himself, another man and Lash (Tr. 200). It is not clear whether Knapp was Smith's supervisor at the time of the alleged violation (A. 283, 284).

The nature of the questions asked was extremely general. Leister and Smith simply were asked about union activity. Indeed, the latter employee was asked about his knowledge of rumors! Inquiries of such a broad, unspecific kind cannot form the basis for an unfair labor practice finding. *Bourne Company* v. *NLRB*, 332 F.2d 47 (2d Cir. 1964). "And even if an employer's limited interrogation is found violative of the Act, it might not be serious enough to call for a bargaining order." *Gissel, supra* at 609.[35]

Moore, while at his work station, was asked whether he had signed a card. The asking of this question, containing no threat of reprisal or force or promise of benefit, does not constitute a violation of the Act. *NLRB* v. *Dale Industries, Inc.*, 355 F.2d 851 (6th Cir. 1966). Smith's questioning was even more innocuous. Both conversations were of extremely short duration. *Welch Scientific Co., Inc.* v. *NLRB*, 340 F.2d 199, 204 (2d Cir. 1965). The isolated and unconnected occurrences relied upon by the Board are not sufficient to establish a violation of the Act. *NLRB* v. *Orleans Mfg. Co.*, 412 F.2d 94, 96 (2d Cir. 1969).

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[35] The unfair labor practices alleged here are minor and not the type which may support a bargaining order. At least one commentator has raised serious questions about the justification for a bargaining order in the context of interrogations and threats:

> "With regard to the type of unfair labor practice involved, a distinction must be drawn between coercive unfair labor practices which seemingly linger and unfair labor practices which are not particularly coercive or do not have a lasting effect. Thus, for example, although interrogation is an unfair labor practice, it is not 'the kind of unfair labor practice that necessarily would preclude an employee from exercising a free choice in a Board-conducted secret ballot election.' Consequently, even intensive interrogation unaccompanied by threats would not seem to foreclose the real possibility of a fair and free election in the future." Perl, *The NLRB and Bargaining Orders*, 15 VILL. L. REV. 106, 114 (1969).

D. *The Impact Of Any Unfair Labor Practices Was Minimal.*

1. The Board's finding has no basis in fact.

After remand subsequent to *Gissel*, the Board concluded that the Company's actions "tended to destroy the Union's majority status achieved by authorization cards and to prevent a free election," and affirmed its issuance of a bargaining order (S.A.3). The Board's conclusion is not supported by fact. The employees involved in the alleged unfair labor practices did not thereafter withdraw support for the Union. On the contrary, their support continued unabated, as shown by their participation in the Union's strike for recognition.

(a) *Jack Zimmerman did not abandon the union cause.*

Zimmerman testified that he went out on strike and did not return to work until after the strike was over (Tr. 143). In fact, Zimmerman was a member of the employees' committee (A. 132).[26] There is no evidence that he ever resigned from the committee. He had no compunction about talking back to Gaudreau, nor, as the Trial Examiner recounted, was he cowed by O'Donnell's questions concerning union activity (A. 1016; 129, 166).[27] The Examiner found that he solicited a signature on an authorization card after the strike began (A. 1028; 145).

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[26] Beatty, the chairman, characterized the group as the "Strike Committee" (A. 186).

[27] The day after Zimmerman's alleged interrogation, Beatty and Zimmerman, together with "a few of the committeemen," confronted Gaudreau and told him, "if you don't keep Bob O'Donnell off this man's [Kenneth Stewart's] back, we are going to walk out" (A. 164-66). Two days after this incident, Zimmerman accompanied Beatty in an effort to arrange a recognition meeting with Company officials (A. 1014; 133-35).

(b) *Floyd Leister did not abandon the union cause.*

Leister, too, joined the strike and picketed. Leister's strong support for the Union occurred after Gaudreau allegedly remonstrated, "I hope you boys don't strike because somebody will be sorry for it" (A. 1016; 198-99). Leister, a member of the employees' committee, stated that he served on the picket line "every day" and that his hours were "3:00 to 11:00" (A. 162, 757).[32]

2. Any improper conduct on the part of the Company produced an effect opposite to that found by the Board.

The Board's contention that the Company's unfair labor practices tended to destroy the Union's majority status is patently without merit. If anything, the opposite is true. As stated by the Eight Circuit in *NLRB* v. *Crystal Tire Co.*, 410 F.2d 916, 920 (8th Cir. 1969):

> "Indeed, the record suggests that their [the Company's] tactics actually stiffened employee resistance to the short-lived anti-union campaign. Each of the Company's ploys was rebuffed by the employees." [33]

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[32] In addition to the foregoing unit employees, those non-unit employees who were allegedly subjected to improper conduct displayed a similar steadfastness to the Union:

Blair Kelly: Allegedly the subject of Beaver's interrogation and veiled threats, Kelley testified that he participated in the picketing during the strike "approximately every day" (A. 728).

Charles Earnest: Notwithstanding Beaver's alleged statement that strikers would be replaced, Earnest testified that he joined the strike (A. 1059; 268-69).

[33] The thesis that employer unfair labor practices produce employee disaffection is questionable. See Lewis, *supra*, at 879 citing Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 HARV. L. REV. 38, 40 (1964). The conventional wisdom is especially open to question here. It might be said that any Company action produced an equal and opposite reaction on the part of the employees.

Any employees subject to the Company's alleged 8(a)(1) conduct, were not coerced. Their subsequent acts constitute the best guide as to the impact of the Company's conduct.

Accordingly, a bargaining order is not justified. "There is no evidence that the employer's misconduct . . . dissipated the union's card majority or caused attrition of support by those on strike." *Seymour Transfer, Inc.*, 179 NLRB No. 5 (1969), slip opinion, TXD at 19.

POINT V

The Board's Order Is Based On a Denial of Due Process And Is Not Entitled to Enforcement.

The Supreme Court in *Gissel* introduced a new standard for imposing bargaining orders. Virtually abandoning the *Joy Silk* good faith doctrine, the Court held that the Board should now look to the impact of an employer's unfair labor practices upon the electoral atmosphere.

On August 1, 1969, the Board moved this Court to withdraw the record in the instant cases in order to reconsider the issues raised by *Gissel*. This Court granted the motion and remanded the record "for further proceedings in light of" *Gissel*.

Upon remand to the Board, the Company moved to remand the case to the Trial Examiner for the purpose of reopening the record to adduce additional evidence, make new findings and reconsider prior findings with respect to the new issues raised by *Gissel*. The Board denied this motion (S.A. 2, n. 2).[46] This action, together with the

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[46] The Board stated:

"We conclude that the issues on the record before us have been fully litigated and further that there is no basis for remanding the case to the Trial Examiner for reconsideration of his prior findings or for making new findings. Accordingly, Respondent's motion is denied."

Board's reaffirmance of its original order, denied the Company due process.

A. *This Case Was Litigated On The Basis Of The Joy Silk Doctrine, Not Gissel.*

A reading of the record and the pleadings establishes that the central issue litigated in this case was whether the Company entertained a good faith doubt as to the Union's alleged majority status.

Board Counsel framed the issue in his opening statement:

> "At the same time as the Union's organizing drive and demands for recognition were made, the Respondent engaged in conduct which clearly negates any possibility of good faith doubt of the Union's majority status."
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> "It is clear, therefore, that Respondent's refusal to grant recognition was motivated by a desire to gain time in which to dissipate the Union's majority and by a rejection of the principles of collective bargaining. *This is a case within the Joy Silk Mill doctrine.*" (A. 17; Emphasis added).[41]

Thus, as originally litigated, the Company's motivation was crucial. However, under *Gissel*, good or bad faith is not in issue. A bargaining order will issue only after other issues are resolved. "[T]he key to the issuance of a bar-

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[41] The *Joy Silk Mills* doctrine, according to the Supreme Court in *Gissel*, holds that:

> "[A]n employer could lawfully refuse to bargain with a union claiming representative status through possession of authorization cards if he had a 'good faith doubt' as to the union's majority status. . . ." 395 U.S. at 592.

gaining order is the commission of serious unfair labor practices. . . ." *Gissel, supra* at 594. Clearly, the Company did not have an opportunity to litigate the question of whether the alleged unfair labor practices were extensive in terms of their past effect on election conditions and the likelihood of their recurrence in the future. Nor did the Company have an opportunity to litigate the question of whether these alleged practices had a tendency to undermine majority strength and impede the holding of a fair election or whether it is possible to erase the effects of these past practices and ensure a fair election by the use of traditional remedies. *Id.* at 614. Accordingly, the Company submits that for the Board to change theories in mid-litigation, without affording the Company the opportunity to present evidence under its new theory, violates due process.

Notice of the *Gissel* issues, particularly the Board's contention that the election process was so impaired by the Company's conduct as to require a bargaining order, should have been given in the complaint. The principal function of the complaint in any legal proceeding, criminal or civil, is notice. Thus, in *Doud's* v. *International Longshoremen's Assn.*, 241 F.2d 278, 283 (2d Cir. 1957), the court stated:

> "The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing."

Where a party has not been given the requisite notice, the courts have refused enforcement. *Engineers & Fabricators, Inc.* v. *NLRB*, 376 F.2d 482 (5th Cir. 1967); *Russell Newman Mfg. Co.* v. *NLRB*, 370 F.2d 980 (5th Cir. 1966); *NLRB* v. *Johnson*, 322 F.2d 216 (6th Cir. 1963); *NLRB* v. *H. E. Fletcher Co.*, 298 F.2d 594 (1st Cir. 1962). The failure

here to afford the Company notice of the *Gissel* issues is critical, for "the case would have been tried differently had it known [these] issue[s] [were] in the case." *NLRB* v. *H. E. Fletcher Co., supra* at 600, n. 5. In short:

> "The company could have presented contrary evidence at the hearing had it known the non-alleged matters would be relied on by the Board and the case might have been tried differently; it was not speculation to deem the Company prejudiced in this situation due to lack of notice." *Boyle's Famous Corned Beef Co.* v. *NLRB*, 400 F.2d 154, 164 (8th Cir. 1968).

B. *This Court Has Previously Stated That A New Hearing Is Required Where The Board Decides A Case On A Theory Different From The One On Which The Case Was Originally Tried.*

The decisions of this Court in *Northeastern Building Trades Council* v. *NLRB (Centlivre Village)*, 122 U.S. App. D.C. 220, 352 F.2d 696 (1965) and *Western States Regional Council* v. *NLRB (Weyerhauser Company)*, 125 U.S. App. D.C. 1, 365 F.2d 934 (1966), warrant a denial of enforcement of the Board's order.[42]

These decisions stand for the proposition that a litigant's rights are prejudicially affected when the Board decides a case upon a theory different from the one upon which it was tried; the Board may not blithely refuse to remand and to permit a hearing before the Trial Examiner when a new theory is introduced.[43]

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[42] These decisions are discussed at length in the Company's Motion To Adduce Additional Evidence, 23-32.

[43] See also *Oleson's Food Stores*, 167 NLRB 543 (1967), where subsequent to the issuance of the Trial Examiner's decision the Board modified and restated the criteria applicable to the polling of employees. The Board refused to rely upon any violation based on the act of polling, stating, *inter alia*:

> "The parties herein have not, of course, had an opportunity to address themselves to such modified criteria. . . ."

The Court's reasoning is applicable to the case at bar. Here, the Board with the Supreme Court's approval, changed the law applicable to the major issues in the case. The parties never had an opportunity to present evidence and cross-examine with reference to these issues. Nor was the Examiner permitted to review his findings or make new findings in light of *Gissel*. The Company submits that, had the Trial Examiner been given the opportunity, he would have reaffirmed his original finding that there were "only a few isolated" unfair labor practices of any substance (A. 1048). That the Examiner would have reaffirmed his original finding is further evidenced by his reliance on *Aaron Brothers of California, Inc.*, 158 NLRB 1077 (1966), and *Hammond & Irving, Inc.*, 154 NLRB 1071 (1965). (A. 1048). The Court in *Gissel* cited both cases in support of the proposition that a bargaining order is not appropriate in all instances involving Section 8(a)(1) conduct, 395 U.S. at 609-610, 615.

In addition, because of the Board's refusal to remand to the Trial Examiner, this Court is precluded from exercising its proper role as a reviewing body in determining whether the Board's findings are supported by substantial evidence.[44]

C. *The Company Never Had An Opportunity To Litigate Whether The Discharges Were A Proper Basis For A Bargaining Order Under Gissel.*

The discharges found unlawful were not litigated in relation to *Gissel*. In its Supplemental Decision, the Board for the first time relied on the allegedly unlawful dis-

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[44] "[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed witnesses and lived with the case has drawn conclusions different from the Board's . . . ." *NLRB* v. *Universal Camera Corp.*, 340 U.S. 474, 496 (1951).

charges, which occurred a month after the union struck for recognition, as mandating the need for a bargaining order:

> "*The Respondent's campaign to defeat the Union's organizational efforts . . . included the discriminatory discharge of three employees. These unfair labor practices tended to destroy the Union's majority status* achieved by authorization cards *and to prevent a free election.* In our view, it is unlikely that the effect of these unfair labor practices could be neutralized by a conventional cease and desist remedy which would ensure a fair election." (S.A. 3; Emphasis added).

This issue of whether the discharges made a free election impossible and required a bargaining order was never litigated. The trial itself reveals no evidence that the Board was relying on the discharges as the basis for the alleged refusal to bargain, thus "demonstrating the nugatory position this issue held in the minds of the parties." *Bob's Casing Crews, Inc.* v. *NLRB*, —— F.2d ——, 74 LRRM 2753, 2755 (5th Cir. July 14, 1970). Indeed, the Board's original Decision and Order is devoid of any reference to the alleged discriminatory discharges, except in regard to a back-pay award (A. 1060).

The Board clearly predicated its initial bargaining order upon the Section 8(a)(1) violations which it outlined in its original Decision (A. 1057-59). It noted:

> "[*T*]*he unlawful acts of Respondent . . . occurred* immediately after Beaver's conference with his managerial and supervisory staff following his meeting with counsel on September 16, and *during the employees organizational efforts between the Union meeting on September 18 and the strike on September 21.*" (A. 1057-58; Emphasis added).

The Board thereupon found that these Section 8(a)(1) violations "were substantial enough to support an inference of bad faith" and issued a bargaining order (A. 1059).

The discharges did not occur until October. They were thus remote in time from the conduct which concerned the Board and were never even considered in its decision to issue a bargaining order.[45]

The Board's precipitous shift in theory has prejudiced the Company and made this Court's reviewing function virtually impossible.

> "In addition to the Company's lack of notice as to these grounds and therefore its lack of preparation and investigation . . . this court is unable to review facts and testimony that might adequately substantiate the . . . [Board's] conclusion.
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> Until a hearing is held to determine the merits of this issue and the parties are given an opportunity to prepare for an adversarial presentation on the question . . ., the record does not show sufficient findings to support the Board's decision." *Bob's Casing Crews, Inc., supra* at 2755.

D. *The Board Has Failed To Set Forth The Reasons For Its Decision That A Bargaining Order Is Required Under Gissel.*

As noted above, the Board, in a footnote, summarily concluded that the issues were fully litigated and there was no basis for remanding the case to the Trial Examiner (S.A. 2, n. 2). The Board gave no reason in support of this

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[45] The Trial Examiner did not refer to the discharges in his discussion of the Company's good-faith doubt (A. 1048).

conclusion or for other conclusions reached in its Supplemental Decision.

In the instant matter the Board failed to explain *why* it found all issues fully litigated; *why* there was no basis for remanding to the Trial Examiner; *why* the Company's alleged unfair labor practices tended to destroy the Union's majority status; *why* these practices tended to prevent a free election; *why*, especially after five years, the effects of any unlawful acts could not be neutralized by a conventional remedy; *why* such a remedy could not ensure a fair election; *why*, in the instant matter, cards are more reliable than an election; and, *why* the policies of the Act would be better effectuated by imposing a bargaining order at this late date.

The Board's failure to explicate is disobedient to the Supreme Court's mandate to resolve the *Gissel* issues by *considering all the surrounding circumstances.* 395 U.S. at 614. The Board has stubbornly refused to consider current and material facts bearing on the issues. Indeed, the Board's entire Supplemental Decision is conclusory. No reasons are given.[46] The reader is treated merely to a recapitulation of the Board's original decision. Surely, this Court did not order the case remanded to the Board for the purpose of having the Board indulge in mere conclusory statements. The Supreme Court said:

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of revewing the Board's orders . . ., *it*

[46] "[T]he reasons for the Board's decision become essential, for lack of clarity in the administrative process infects review with guess work." *NLRB* v. *Clement-Blythe Companies,* 415 F.2d 78, 82 (4th Cir. 1969).

> *will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order* . . . . All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 197 (1941). (Emphasis added).

In *NLRB* v. *Clement-Blythe Companies, supra,* the Court refused to enforce the Board's bargaining order because the Board failed to say why there had been a violation of the law:

> "When the Board rules that an employer has committed an unfair labor practice, the employer is entitled to know, *and the Board is charged with the duty of stating, the reasons why* the Board concluded the facts showed a violation of the law." 415 F.2d at 81. (Citations omitted; Emphasis added).

Section 557 (c) of the Administrative Procedure Act (5 U.S.C. §557 (c)) requires that:

> "All decisions, including initial recommended, and tentative decisions, are a part of the record and shall include a statement of (A) findings and conclusions, *and the reason or basis* therefor, on all material issues of fact, law, or discretion presented on the record. . . ." (Emphasis added).

In a case very similar to the case at bar, where the Board also refused to reopen the record and make proper findings on remand after *Gissel,* the Fifth Circuit stated:

> "The Supreme Court indicated that an open free election rather than a bargaining order is the preferred remedy if such an election is possible. We think it

clear from the foregoing that the Court in *Gissel* clearly contemplated that no bargaining order should be issued *unless at the time the Board issues such an order it finds the electoral atmosphere unlikely to produce a fair election.*

In the instant case the Board made no such finding before it issued the December 3, 1969, bargaining order which we are here asked to enforce. Instead, on remand *the Board refused to look at the contemporary necessity for such an order, satisfying itself with a jejune regurgitation of the Company's 1965 waywardness. We deem such findings insufficient* under the teachings of *Gissel* to justify a 1970 bargaining order.

• • •

In addition, we think a further word of caution is in order. In our previous disposition of this case we requested findings from the Board. *The response which we received was a litany, reciting conclusions by rote without factual explication.* We believe that the questions involved in this area of labor law are far too important for such formalistic and perfunctory treatment." *NLRB* v. *American Cable Systems, Inc.*, 427 F.2d 446, 448-49 (5th Cir. 1970). (Emphasis added).

In view of the foregoing, the Company respectfully submits that the Board's terse refusal to reopen the record and its insouciant treatment of the Supplemental Decision warrant denying enforcement of its Supplemental Order. The Company was unable to present relevant and material evidence within the framework of the Supreme Court's new standards. Also, it was found guilty of unlawful conduct without notice or an opportunity to defend itself in a fair trial. The Company was not even accorded a full, reasoned explanation of why its conduct now necessitates a bargain-

ing order. The Board's action not only precluded a comprehensive analysis of the issues raised by *Gissel,* but also constituted a serious violation of due process.

E. *The Board's Supplemental Order Was The Result Of An Improper Exercise Of Power.*

In *Gissel,* the Board was announcing new rules of substantive law. 395 U.S. at 594. The Board formulated these rules without benefit of rule-making or adjudication. Here, the Board improperly seeks to apply these rules to a case which it adjudicated before *Gissel.*

1. The Board contravened the Administrative Procedure Act by failing to engage in statutory rule making.

The Administrative Procedure Act defines a rule as "an agency statement of general or particular applicability and future effect." 5 U.S.C. § 551 (4). Rule making means "agency process for formulating, amending or repealing a rule." 5 U.S.C. § 551 (5). The Act requires, *inter alia,* publication in the Federal Register of notice of proposed rule making and of hearing; an opportunity to be heard; a statement in the rule of its bases and purposes; and publication in the Federal Register of the rule as adopted. 5 U.S.C. § 553. *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 763-64 (1969). In *Gissel,* as here, the Board complied with none of these requirements.

As stated in the plurality opinion in *Wyman-Gordon*:

> "The rule-making provisions of the Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. . . . They may not be avoided by the process of making rules in the course of adjudicatory proceedings." *Id.* at 764.

The plurality opinion justifies denying enforcement here. The present Supplemental Order, unlike the order in *Wyman-Gordon*, is irredeemable. It is not an "unquestionably valid" directive issued *"in an adjudicatory proceeding" where the parties have participated. Id.* at 766. (Emphasis added).

2. The Board did not comply with the requirements for adjudication.

Assuming that the Board possesses a quasi-legislative power through adjudication, as the concurring opinion in *Wyman-Gordon* maintains, the Board did not comply with the requirements of adjudication in *Gissel*. The Act defines "adjudication" as "agency process for the formulation of an order." 5 U.S.C. § 551(7). The concurring opinion in *Wyman-Gordon* noted:

> "The procedure to be followed in 'adjudication,' which includes notice of the issues, an opportunity for responsive pleadings, a hearing, and decision, is specified in 5 U.S.C. §§ 554, 556, and 557." 394 U.S. at 771, n. 3.[47]

In *Gissel*, the Board's announcement did not occur until oral argument in the Supreme Court, after its adjudication had been completed. The new practice thus did not arise as an "inseparable part of the . . . [Board's] adjudicatory process." *Id.* at 773. Rather, the Board decided "to announce a brand new rule of law to govern labor activities in the future. . . ." *Ibid.*

Similarly, here, *after* the Board had completed its adjudication and had rendered its decision, it changed the standards by which it was deciding the case and issued a

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[47] The concurring Justices found that the Board's order in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), was the result of such an adjudication. Therefore, the order constituted a proper ruling for future cases. *Id.* at 772-74.

new decision. All this was done without notice of the issues as set forth in a complaint, without an opportunity for responsive pleadings, without a hearing relevant to these documents and without a reasoned decision: in short, without due process.

The Company submits that if the Board now seeks to argue this matter within the framework of *Gissel,* it must first comply with the rule making or adjudicatory requirements of the APA. Nothing in *Wyman-Gordon* or in *Gissel* authorizes a wholesale retroactive application of the Board's "current practice" regarding bargaining orders. As one scholar has argued:

> "The special techniques of agencies should be used to minimize retroactivity of policy; that we must tolerate retroactive decisions from courts should be no excuse for being indulgent with administrative agencies for the same kind of conduct."[48]

POINT VI

The Board Failed to Consider Current Conditions In Deciding to Enter a Bargaining Order.

The Board's Supplemental Decision fails to reflect developments up to and including the time of its issuance. It therefore does not consider "the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." *Gissel, supra* at 614. Nor does it determine whether the effects of past practices have been erased and whether the conditions suitable for an election have been restored.

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[48] Bernstein, *NLRB's Excelsior Rule: Adjudication or Rule-Making,* 71 LRR 585, 607 (1969).

A. *The Decisions In Clark's Gamble And American Cable Underscore The Importance Of Considering Current Conditions.*

1. The decisions in Clark's Gamble are sound authority for denying enforcement of the Board's Order.

The United States Court of Appeals for the Sixth Circuit has recognized that the Board must avail itself of material evidence existing at the time it issues its supplemental decision. In *Clark's Gamble Corporation* v. *NLRB*, 407 F.2d 199 (6th Cir. 1969), the court remanded the case to the Board, stating that intervening employee turnover was a relevant consideration:

> "Specifically, the Board is enjoined to determine the extent to which there has been a change in the identity of the employees since the time demand for recognition was made. If such change is found to have been substantial it is directed that the Board cause a representation election to be conducted." *Id.* at 202.[49]

After remand by the Supreme Court following *Gissel*, the case was again before the Sixth Circuit. 422 F.2d 845 (6th Cir. 1970). At this time, the Board contended that *Gissel* did not warrant a consideration of employee turnover. The court rejected the argument:

> "The Board further argues that *Gissel* 'makes plain that • • • intervening employee turnover' does not justify refusal to enforce an otherwise warranted bargaining order, but we find no reference therein to 'intervening employee turnover.'" *Id.* at 847.

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[49] The Board filed a petition for certiorari in *Clark's Gamble* (No. 265, October Term, 1970). On October 19, 1970, the Supreme Court denied the petition. —— U.S. ——, 75 LRRM 2416.

Instead of merely reviewing prospective considerations which might have entered into the Board's original decision to impose a bargaining order, the court focused upon its own retrospective consideration of the facts:

> "Emphasis was and is placed on the fact that the delay was not occasioned by procrastination or delaying tactics on the part of the respondent, but rather by the Board and its employee. This clearly takes the case out of the contemplation of *Gissel* . . . ." *Id.* at 846-47.

Turning to the merits of the case, the court did not agree with the Board that the policies of the Act would best be effectuated by enforcing a bargaining order:

> "The thrust and philosophy of the Act is that employees be represented by a bargaining agent of their choice and in this situation which fails to reflect the selection of an agent by the employees sought to be affected, and where the period for personnel turnover has been extended by Board—occasioned delay, we conclude that it would be contrary to the intent of the Act to order enforcement." *Id.* at 847.

In the instant matter, as in *Clark's Gamble,* the Board refused to engage in the retrospective consideration contemplated by *Gissel.* Specifically, it declined to consider any changes in the intervening years, including employee turnover.

This case also resembles *Clark's Gamble* in that Board-occasioned delay has been a major factor permitting these changes to occur and preventing the expeditious adjudication of this case.[50]

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[50] See Chronology attached hereto as Appendix "A".

2. The decision in American Cable is sound authority for denying enforcement of the Board's order.

The United States Court of Appeals for the Fifth Circuit has held that the Board must consider *present* circumstances before issuing a bargaining order based on *past* unfair labor practices. In *American Cable Systems, Inc., supra* at 448, the court admonished the Board for failing to make such a consideration:

> "In making its determination on December 3, 1969, that the Company's 1965 violations of Section 8(a)(1) and (3) precluded a fair election and necessitated a bargaining order, the Board specifically refused to consider evidence offered by the Company that a complete turnover in employees and the departure of the only management official involved in the unfair labor practices made a free election possible at that time.
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> We think that on remand the Board should have taken the opportunity to consider the then existing situation at American Cable to determine whether the electoral atmosphere was still so contaminated that a bargaining order was then justified."[51]

The Board similarly refused to consider present circumstances at Beaver Brothers in issuing its Supplemental Decision and Order. Its Supplemental Decision clearly reflects a preoccupation with events long past.

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[51] The Court also stated:

"Gissel does not apply a *nunc pro tunc* principle, giving the then sins of the Company a now application. It requires contemporaneity—a present view, albeit with an historical perspective." *Id.* at 449.

B. *The Decision In L.B. Foster Is Not Precedent For The Granting Of Enforcement.*

The decision of the Court of Appeals for the Ninth Circuit in *NLRB* v. *L.B. Foster Co.*, 418 F.2d 1 (9th Cir. 1969), heavily relied on by the Board (P.S.B. 8-9), is not controlling in the instant matter. There, the court reviewed an initial Board order. Finding that the prospective considerations underlying the order conformed to the *Gissel* requirements, and that there was substantial evidence supporting the Board's decision, it granted enforcement.

The situation here is different. Upon *reconsideration,* in light of *Gissel,* the Board's duty is not merely to rewrite its earlier decision. The prospective considerations once relied upon to justify a bargaining order must be tested against current factual developments. If these developments have not borne out the Board's initial fears, then the bargaining order should be withdrawn.

The distinction between the *Foster* case and the type of case at bar has been given judicial recognition. In *American Cable, supra* at 448, the court stated:

> "The Board's refusal to consider these changes occurring in the intervening years was apparently predicated on the opinion of the Ninth Circuit in *NLRB* v. *L.B. Foster Co.*, 9th Cir. 1969, 418 F.2d 1. In *Foster* the complaint was made that changes occurring between the Board's original order and the enforcement proceeding made enforcement of the bargaining order inequitable. The Court refused to consider those changes and enforced the order based on the Board's original findings. The *Foster* case, however, is distinguishable because although it was decided after *Gissel* it did not involve a remand in light of that case to the Board for additional findings. In the instant case a different situation obtains."

Accordingly, the Company submits that the Board's reliance on *Foster* is misplaced.

C. *There Has Been No Reliable Finding Of Employee Free Choice.*

In *Gissel,* the Supreme Court stated that "effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior" in issuing a bargaining order. 395 U.S. at 614. Here, the Board has concentrated on the latter goal to the exclusion of the former.

The crucial words in the Court's directive are "ascertainable" and "free." The 1965 employees' choice was neither ascertainable nor free. As we have shown, the cards used by the Union were inherently unreliable. The Board could not determine with any certainty the employees' choice based on card signatures. Even if the cards, on their face, were a means by which representational desires could be ascertained, the coercion exerted by the Union deprived employees of free choice.

But what of present employees? They are the people who, in fact, will have to live with the Union in the event this Court enforces the Board's order. They have not been consulted at all. Indeed, the Board spurns any attempt to compel it to have them consulted.

A professed purpose of the Act, and of the Board's administration of it, is to promote industrial peace and stable labor relations. How can this purpose be effectuated under the present policy of issuing antiquated bargaining orders?

Two solutions commend themselves. First, if the Board insists upon issuing bargaining orders after the passage of much time, then it should first obtain a concurring majority of present employees. This would insure that the Union would be favorably received at the time the Board's order is enforced. A referendum of this type would not be diffi-

cult to conduct. There is no suggestion that present employees have in any way been interfered with by either the Company or the Union.[52] The Board could establish appropriate rules for employer and union conduct in the pre-referendum period.

Second, the Board, in its lawful discretion, could devise appropriate remedial orders apart from orders to bargain. Such orders could vindicate any abridged rights of former employees and the Union, without infringing upon the rights of current employees. Such an alternative is especially attractive in the instant case where many factors cloud the legitimacy of the Union's claim of majority status.

[52] Forty-nine of the original fifty-nine employees are no longer employed by the Company.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Company respectfully requests that the Board's Supplemental Decision and Order be denied enforcement.

Respectfully submitted,

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ROGER S. KAPLAN

Dated: November 13, 1970.

APPENDIX "A"

Chronology

Date of Occurrence	*Occurrence*	*Time Elapsed After Occurrence*
October 21, 1965	Original charge filed (6-CA-3422)	7 days
October 28, 1965	Amended charge filed (6-CA-3455)	53 days
December 20, 1965	Complaint and Notice of Hearing in 6-CA-3455	10 days
December 30, 1965	Order consolidating cases	4 days
January 3, 1966	Company's Answer to Complaint in 6-CA-3455	14 days
January 17, 1966	Charge in 6-CA-3518 filed	21 days
February 7, 1966	Complaint and Notice of Hearing in 6-CA-3518 and Order Further Consolidating Cases	10 days
February 17, 1966	Company's Answer to Complaint in 6-CA-3518	26 days
March 15, 1966	Hearing opened	31 days
April 15, 1966	Hearing adjourned indefinitely	19 days
May 4, 1966	Trial Examiner's Order Closing Hearing	99 days
August 11, 1966	Trial Examiner's decision	43 days
September 23, 1966	Company's and General Counsel's exceptions	45 days

Appendix "A"

Date of Occurrence	*Occurrence*	*Time Elapsed After Occurrence*
November 7, 1966	Union's exceptions	39 days
December 16, 1966	Order Reopening Record and Remanding Proceedings to Regional Director for Further Hearing	34 days
January 19, 1966	Company's Motion To Remand Proceeding For Purposes of Additional Findings of Fact and Conclusions of Law by Trial Examiner	22 days
February 10, 1967	Order Granting Motion and Amending Order	46 days
March 28, 1967	Hearing re-opened and closed	108 days
July 14, 1967	Trial Examiner's Supplemental Decision	45 days
August 23, 25, and 28, 1967	Company's, General Counsel's and Union's exceptions, respectively	268 days
May 23, 1968	Board's Decision and Order	1 day
May 24, 1968	Union's petition for review, D.C. Circuit (No. 21,966)	42 days
July 5, 1968	Board's petition for enforcement (No. 22,089)	1 year, 27 days

Appendix "A"

Date of Occurrence	*Occurrence*	*Time Elapsed After Occurrence*
August 1, 1969	Board's Motion To Withdraw The Record In Order To Reconsider Certain Issues Raised By The Supreme Court's Decision in *NLRB* v. *Gissel Packing Co.*	77 days
October 17, 1969	Court's Order granting Board's Motion	25 days
November 11, 1969	Company's Statement of Position And Motion To Remand To The Trial Examiner For The Purpose Of Reopening The Record To Adduce Additional Evidence, Make New Findings, And Reconsider His Prior Findings	13 days
November 7 and 24, 1969	General Counsel's Statement Of Position and Opposition To Motion To Remand	184 days
May 22, 1970	Board's Supplemental Decision and Order	

On November 27, 1970, all briefs will be due in this proceeding. The total elapsed time from the filing of the original charge herein will be: *five years, one month* and *six days.*

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,966

AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BEAVER BROTHERS BAKING CO., d/b/a AMERICAN BEAUTY BAKING CO.,

Intervenor.

No. 22,089

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

BEAVER BROTHERS BAKING CO., d/b/a AMERICAN BEAUTY BAKING CO.,

Respondent.

PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

MOTION BY THE COMPANY FOR LEAVE TO FILE A SUPPLEMENTARY BRIEF AND SUPPLEMENTARY BRIEF ON BEHALF OF THE COMPANY

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
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New York, New York 10036

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,966

AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

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Respondent.

PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

MOTION BY THE COMPANY FOR LEAVE TO FILE A SUPPLEMENTARY BRIEF

The Company hereby respectfully moves, pursuant to Rule 28(c) of the Federal Rules of Appellate Procedure, for leave to file a supplementary brief in the instant case.

The brief is necessitated by the General Counsel's attempt in his reply brief to place an erroneous interpretation on the Trial Examiner's ruling precluding cross-examination.

For the above-stated reason we respectfully urge this Court to grant this motion for leave to file the accompanying supplementary brief in the instant case.

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Attorneys for Company
11 West 42nd Street
New York, New York 10036

Dated: June, 1969

United States Court of Appeals
for the District of Columbia Circuit

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED JUN 30 1969

No. 21,966

Nathan J. Paulson
Clerk

AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

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PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTARY BRIEF ON BEHALF OF THE COMPANY

The Company argued at length in its brief to this Court, that it was denied due process of law when the

Board refused to permit cross-examination of employee witnesses at the remand hearing on the all-important issue of the circumstances under which they signed authorization cards. The General Counsel contends (G.C. Reply Brief, 6-10) that the Company was not prejudiced by this denial of cross-examination because it could have called the employees to testify on direct examination. General Counsel further states that the Company's claim that it was denied due process "rests solely on the Examiner's action . . . *in effect* requiring the Company to adduce any such evidence by calling the employees as its own witnesses. . . ." (G.C. Reply Brief, 8).

General Counsel's interpretation of the Trial Examiner's rulings is totally erroneous. The Trial Examiner did not, either explicitly or impliedly, require the Company to call the employees as its own witnesses. In fact, the Trial Examiner's rulings dictate a contrary conclusion—that had the Company called the witnesses as its own, he would not have permitted it to adduce evidence concerning the circumstances under which they signed cards.

1. ***The Trial Examiner ruled that the remand hearing was limited to the authentication of the cards.***

In his Supplemental Decision, the Trial Examiner ruled that the purpose of the remand hearing was limited "*solely*" to the authentication of cards. In explaining why he limited the Company's examination of witnesses, the Trial Examiner stated:

> "This ruling was based upon the Board's remand order which specifically provided for the adducement of testimony *solely with respect to the authenticity* of the signatures appearing on the cards." (A. 1045-46).

Thus, the Trial Examiner narrowly construed the Board's remand order. He did *not* understand the order to permit

any examination as to the circumstances of signing. It would have been a futile gesture for the Company to call the witnesses as its own for this purpose.

2. ***The Trial Examiner ruled during the remand hearing that he would not permit any examination as to the circumstances of signing.***

At the remand hearing when the Company sought to examine General Counsel's witnesses with respect to the circumstances of their signing authorization cards, the Trial Examiner refused to permit such questions. But he did not state that he was only limiting cross-examination and would permit the Company to call the witnesses as its own to ask the same questions. He unequivocally stated that he was "*not going to permit questions along those lines to be asked of these witnesses.*" (A. 847). Thus the Trial Examiner stated that he would not permit such questions, either on cross or direct examination. His ruling left room for no other interpretation. It would have been futile for the Company to call the witnesses as its own.

3. ***The Company's offer of proof.***

The Trial Examiner clearly refused to permit any examination of witnesses as to the circumstances of their signing cards. General Counsel's contention that the Company should have called the witnesses as its own is therefore specious. It would have been to no avail.

General Counsel's contention must also fail because the Company's offer of proof, although directed toward the limitation of cross-examination, also encompassed calling the witnesses as its own.[1] (A. 876-877).

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[1] General Counsel's reliance on *Howard* v. *United States*, —— U.S. App. D.C. ——, 389 F. 2d 287 (1967); *Natvig* v. *United States*, 98 U.S. App. D.C. 399, 236 F. 2d 694 (1956), *cert. denied*,

4. ***The hearing was concluded on the issue of the Company's right to cross-examine.***

The following colloquy took place at the conclusion of the hearing:

"Mr. Lewis: I tell you this: If the Board should grant this request (to cross-examine) and resume this hearing, I'm going to expect all these Witnesses to be in this Courtroom the way they were here today.

• • •

"Trial Examiner: Well, we'll let the record remain as it is but inasmuch as these witnesses have been called by General Counsel,[2] they should be made available for cross-examination if the Board decides that such cross-examination is appropriate. My feeling offhand would be that they are still General Counsel's Witnesses and that the burden of producing them should fall upon General Counsel. Now, I make no commitments but that is my feeling at the present time since he was cut off of cross-examination.

• • •

"Trial Examiner: Okay. And in due time, I'll prepare and file with the Board my decision in this pro-

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352 U.S. 1014; *Collazo* v. *United States*, 90 U.S. App. D.C. 241, 196 F. 2d 573 (1952), *cert. denied*, 343 U.S. 968, is misplaced. In these cases this Court approved a limitation of cross-examination on non-crucial questions. But here, the Board precluded the Company from cross-examining as to the most crucial issue in the case. In *Viereck* v. *United States*, 76 U.S. App. D.C. 262, 130 F. 2d 945 (1942), *reversed on other grounds*, 318 U.S. 236 (1942), also relied upon by General Counsel, the appellant was given extraordinary latitude during cross-examination. Here the Company was not allowed any cross-examination on the most material issue in the case.

[2] General Counsel stated that "The Company had again subpoenaed all of the 48 employees whose names appeared on the cards, at the remaind . . . " (G.C. Reply Brief, 7). The Company did not subpoena the employees. The General Counsel is in error.

ceding provided that the Board sustains my ruling with respect to the Cross-examination which has been precluded. I assume that Respondent does not wish to file a new memorandum of brief?" (Tr. 929-30).

It is clear that the hearing was concluded on the issue of whether the Company should be permitted to cross-examine. Any question as to the Company's calling these witnesses was never reached.

The Trial Examiner did not "in effect" require the Company to call the witnesses as its own. General Counsel's reliance on such a tenuous claim underscores the utter weakness of his case.[2]

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Attorneys for Company
11 West 42nd Street
New York, New York 10036

Dated: June 1969

[2] "The Courts may not accept appellate counsel's post hoc rationalizations for agency action." *Burlington Truck Lines* v. *United States Lines*, 371 U.S. 156, 168 (1962); *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965).

Nos. 21,966 and 22,089

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,966

AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

and

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING COMPANY, Intervenor

---

No. 22,089

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO., Respondent

---

On Petition To Review and on Petition for Enforcement of an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CASES–Continued

*Cases or authorities chiefly relied upon.

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*Cases or authorities chiefly relied upon

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CASES-Continued

*Cases or authorities chiefly relied upon

CASES—Continued

*Cases or authorities chiefly relied upon.

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STATUTE:

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,966

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On Petition To Review and on Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUES PRESENTED

NO. 21966

The Board and the Union[1] have stipulated that the issues herein are as follows:

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[1] The Company's motion for leave to intervene in this proceeding, filed on March 14, 1969, had not been acted on at the time that this brief was filed in typewritten form. This motion was granted on May 5, 1969.

1. Whether the Board properly found that employees John Beatty, Gerald Goss, Allen Coudriet and Charles Hoar were properly discharged for engaging in flagrant acts of strike misconduct unprotected by the Act and were not entitled to reinstatement.

2. Whether the Board properly found that the Company did not violate Section 8(a)(3) and (1) of the Act by refusing to reinstate unfair labor practice strikers who conditioned their offer to return to work on reinstatement of all the strikers, including the four employees that the Board found were properly discharged for strike misconduct.[2]

NO. 22089

In No. 22089 the Board is seeking to enforce the same order most of whose provisions were challenged by the Company in No. 22452, *Beaver Brothers Baking Co., Inc., d/b/a American Beauty Baking Co. v. N.L.R.B.* On March 10, 1969, this Court granted the Company's motion for leave to withdraw this petition "with prejudice." While both No. 22089 and No. 22452 were still pending before this Court, the Board and the Company held a conference at which they were unable to agree upon a statement of issues in these cases; and about March 11, 1969, the proposed issues set forth below were submitted to the Court by the Board and the Company. The Board has filed with this Court a motion to clarify the Court's order permitting the withdrawal of the Company's review petition "with prejudice," suggesting that such order may procedurally bar the Company from now challenging in the Board's enforcement proceeding the matters raised in the Company's withdrawn petition (namely, all of the issues sub-

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[2]By order dated April 30, 1969, after this brief was filed in typewritten form, the Court modified this prehearing stipulation "to the extent that intervenor may argue in its brief that issue no. 2 is not properly before the Court."

mitted by the Board, and issues 1 through 3 and 5 of the issues submitted by the Company). However, in order to expedite the final disposition of this proceeding, the Board is filing essentially the same brief herein as it would have filed if the Company's review petition had not been withdrawn.[3]

A. As of March 9, 1969, the Board believed the issues in this case to be as follows:

1. Whether substantial evidence on the whole record supports the Board's conclusion that the Company interfered with, restrained, and coerced its employees in the exercise of their organizational rights in violation of Section 8(a)(1) of the Act.

2. Whether substantial evidence on the whole record supports the Board's conclusion that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

A. Whether the Board abused its discretion in finding that a unit of production and maintenance employees was appropriate.

B. Whether substantial evidence on the whole record supports the Board's finding that a majority of the employees in the unit found appropriate properly designated the Union as their collective-bargaining agent.

C. Whether substantial evidence on the whole record supports the Board's conclusion that the Company's refusal to bargain was not motivated by a good-faith doubt of the Union's majority.

The Company believes the issues are as follows:

1. Did the Company have a good-faith doubt of the Union's majority interest.

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[3]On April 14, 1969, after this brief was filed in typewritten form, the Court clarified its March 10 "with prejudice" dismissal order so as, in effect, to render the stipulated issues unaffected by such dismissal.

a. Was the Company aware of the coercive tactics used by the Union to solicit authorization cards.

   1. Did the Union coerce employees to sign.

   2. Did the employees inform management that they had been coerced to sign.

b. Was the Company's doubt as to the Union's status based on the advice of counsel, and if so, was this a bona fide reason for refusing recognition.

c. Were the Company's efforts to have the Union's status resolved through an election evidence of good faith.

   1. Did the Company try on several occasions to obtain an election.

   2. If so, were the Company's efforts in this regard evidence of good faith.

   3. Did the Company intend to deny the Union recognition under any circumstances.

d. Did the Board err with respect to the use of evidence concerning strike participation.

   1. Did the Board err by depriving the Company of the right to adduce evidence of strike participation to establish its doubt as to the Union's majority status.

   2. Did the Board err by relying on evidence of strike participation to find that the Company's refusal to bargain violated the Act.

e. Did the Union's unlawful conduct justify the Company's continued withholding of recognition.

f. Did the Company's alleged 8(a)(1) conduct vitiate its good-faith doubt of the Union's majority status.

1. Did the responsible management officials commit any violations of Section 8(a)(1).

2. Did the Board err in reversing the Trial Examiner's decision that any 8(a)(1) conduct did not justify an inference that the Company's refusal to bargain was in bad faith.

g. Was the Company's withholding of recognition where the Union did not have a majority in the requested unit evidence of good faith.

1. What was the unit requested by the Union.

2. Was the unit requested inappropriate, therefore justifying the the Company's refusal to bargain.

2. Did the Union represent an uncoerced majority in an appropriate unit.

a. Did the Union's coercive tactics taint all the authorization cards.

b. Did the Union represent a majority of the employees in the unit requested.

c. Were the Board's unit findings incorrect.

d. Did the Union represent a majority of the employees in the unit appropriate.

3. Was the Company denied due process.

a. Did the Board err by reopening the record.

b. Should the Company have been given an opportunity to cross-examine witnesses at the remand hearing.

4. Whether the Company was warranted in discharging and refusing

to reinstate Floyd Leister, Blair Kelly and Richard Burge because of their strike misconduct.[4]

In accordance with Rule 8(d) of the General Rules of this Court, the Board states that this case is before the Court for the first time on the merits.

STATEMENT OF THE CASE

Case No. 21,966 is before the Court upon petition of the American Bakery & Confectionery Workers International Union, AFL-CIO (hereafter "the Union") to review portions of an order of the National Labor Relations Board issued against Beaver Brothers Baking Co., etc., (hereafter "the Company") on May 23, 1968, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*). In Case No. 22,089 the Board has petitioned for enforcement of its order. The Board's decision and order are reported at 171 NLRB No. 98. This Court has jurisdiction of this case under Section 10(e) and (f) of the Act; the Board's jurisdiction is not contested.

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[4]After the execution of a stipulation setting forth the foregoing issues as submitted by the respective parties, by letter dated March 10, 1969, on the same date as the withdrawal of its review petition with prejudice and referring to the docket number in that proceeding, the Company requested the addition of the following issue:

> "Under all the circumstances, including the present employee complement, is an order to bargain an appropriate remedy?"

By letter dated March 13, 1969, the Board stated that it would agree to add this new issue to the Company's issues as set forth in the executed stipulation, reserving any commitment as to whether the Company may now raise this issue in view of the Court's dismissal of its review petition (the subject of a then pending Board motion for clarification, *supra* pp. 2-3) and in view of Section 10(e) of the Act.

By order dated April 11, 1969, after this brief was filed in typewritten form, the Court amended this stipulation so as to add such issue to those as stated by the Company.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(1) of the Act by threatening and coercively interrogating its employees concerning their Union activities. The Board also concluded that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. In addition, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging three employees because of their Union activities. As to four other employees, the Board found that they were properly discharged for engaging in flagrant acts of strike misconduct unprotected by the Act and that their reinstatement would not effectuate the policies of the Act. The evidence upon which the Board based its findings is summarized below.

A. The Company's Anti-Union Background[5]

The Company's principal place of business, and its only location involved in the instant case, is at Burnham, Pennsylvania, where the Company produces and sells bakery products (A. 1012; 519).[6] Before the Union's organizational efforts in September 1965,[7] no union had represented the Company's employees. There had been previous organizational attempts which the Company had successfully opposed (A. 1013; 218, 978). Thus, about a year and a half before the Union's organizational drive began, Foreman Russell Lash asked employee Floyd Leister if he

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[5]The conduct set forth in this section is not alleged as violative of the Act but is related only as background for the violations found.

[6]"A." references are to the Appendix. Occasional "Tr." references are to the pages of the transcript not in the appendix. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

[7]All dates refer to 1965 unless otherwise stated.

knew anything about union activities in the bakery. When Leister disclaimed knowledge, Lash warned, "Well for your sake I hope you are not involved in this" (A. 1013; 192). About this same time Company President and chief stockholder Guy Beaver told this employee that "he wouldn't operate under a union" and "would not have anybody else tell him how to run his business" (A. 1013; 197, 556, 657).

In the spring of 1965, employee John Beatty contacted an agent of the Textile Workers Union in an attempt to have it organize the Company's employees. At about the same time, Company Production Manager Donald Gaudreau asked Beatty if he had heard anything about a union trying to organize the bakery. When Beatty acknowledged hearing such a rumor, Gaudreau warned that the Company "wouldn't let a Union come in," and "that Mr. Beaver would close the doors before they would let a Union come in" (A. 1013; 155-157). Shortly thereafter, during June, Beatty approached Gaudreau about a wage increase. Gaudreau told the employee that he would have to see Company Vice President Donald Dilliplane or General Manager William Stuckey and then remarked, "You know you fouled yourself up a while back when you got yourself involved with this union" (A. 1013; 157, 557). During the summer, Gaudreau and Stuckey summoned employee Jack Zimmerman into President Beaver's office and, in Beaver's presence, told the employee that "there wouldn't be any good to have a Union and . . . [he] wouldn't be able to get as many hours and as much money with the Union" (A. 1013; 131-132). In August Gaudreau told employee Gerald Goss that if he "had any intentions of starting a union, . . . just forget it," and commented that "he liked his job too well for a union to come in." Goss replied that he "had no such intentions" (A. 1013; 113, 118).[8]

[8]The above findings were based on uncontradicted testimony (A. 1013, n. 6).

B. The Union commences its campaign to organize the Company's employees; the Company responds with threats and coercive interrogation

1. *Organizational efforts begin; President Beaver warns the employees of the dangers of unionization*

About mid-September, employees Charles Hoar and John Beatty contacted the Union and arranged for an employee meeting with union representatives for September 18 (A. 1013; 22, 159, 205). The Company quickly became aware of the organizational activities of its employees and on September 16, Beaver, Stuckey, and Company Vice President Donald Dilliplane met with its attorney to discuss the situation. The attorney supplied legal advice and written material to guide them in dealing with the Union, including prepared notes for a speech that Beaver made to the assembled employees the following afternoon (A. 1013; 667-668, 705, 707-708). Beaver told his assembled employees that he was aware of their union activities and noted that the bakery had progressed without outside interference, mentioning the Company's bonus and medical insurance plan. He cautioned them to be careful about signing because they might "be authorizing this union to be your bargaining agent" and that "there is no obligation to go to a union meeting, or let these people bother you at home" (A. 1013-1014; 206, 221, 225-227, 245-247, 1010C).

2. *The employees attend their first union meeting and sign authorization cards; the Company refuses to bargain and responds with threats and coercive interrogation*

a. "We don't recognize any unions"

In the early afternoon of Saturday, September 18, the employees attended the first union meeting (A. 1014; 21-24, 31, 42-44, 160, 178-181). The meeting commenced with employee Beatty introducing Peter

Pointak, the Union's vice president, and Martin Bacon, its representative, to the employees. Pointak described the nature of and benefits to be derived from joining the Union and then explained that in order to represent the employees, the Union would have to secure signed authorization cards from them and he would demand recognition from their employer as soon as the meeting ended (A. 1014; 23-24). The writing on the Union authorization cards was read aloud to the employees and cards were passed out, for the first time, at the meeting.[9] Thirty-one authorization cards were signed by the employees at the meeting and turned into the Union representative, with extra cards retained by some employees for distribution to employees not present (A. 1053, 1055, 1014, 1027; 24, 26, 43, 47-48, 108, 160, 770-771).

Following the close of the meeting at about 3:30 p.m., Pointak and Bacon visited the bakery but were unable to enter because the doors were locked (A. 1014; Tr. 27, 33-34, 44-45, 100, 661-662). They then went to a nearby store from which Pointak telephoned Beaver. Pointak told Beaver that the Union represented a majority of the production and maintenance employees, and requested a meeting in order to obtain recognition. Beaver replied, "We don't recognize any unions" (A. 1056, 1014; 27, 35, 102). Beaver admitted that he did not express any doubt concerning the majority representation of the Union at this time (A. 1056; 662-663). Bacon testified that Pointak told Beaver that he was willing to submit to a card check (A. 102, 1008-F(2)). Beaver told Pointak that he preferred to have him make further contacts through the New York law firm of his attorney, Robert Moss (A. 1014; 27, 28, 35).

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[9]The wording of the cards, which are not claimed to be ambiguous, is set forth *infra*, p. 33.

b. Threats and Coercive Interrogation

After attending the above described union meeting, employee Jack Zimmerman returned to work, where he was immediately confronted by Foreman Robert O'Donnell, who asked whether he had signed a union card. Although he had signed a card, the employee replied that he had not. O'Donnell asked him whether he knew who was instigating the Union's organizational efforts. Again, although he knew the answer, the employee disclaimed any knowledge. O'Donnell then replied that he thought it was Beatty, and if it were "we will get rid of him." O'Donnell then reminded Zimmerman of the incident during the summer when General Manager Stuckey and Production Manager Gaudreau had warned the employee that unionization would mean fewer hours and less money for him (A. 1058, 1015-1016; 127-132).[10]

Around this same time, Production Manager Gaudreau approached employee Donald Moore at his work station and stated that he "heard the rumor that the Union was going around and he wanted to know if [Moore] had anything in it, and then he asked [him] if [he] had signed the card." Although he had signed a card, Moore also replied that he had not signed and was not involved (A. 1058, 1017; 276-277).

On September 19, President Beaver called employee Blair Kelley into Gaudreau's office and said "I suppose you've been approached by someone with the card?" He told the employee that union shops are based on a 40-hour week and asked him how many hours he worked. When Kelley replied "60," he was told to give the matter serious thought (A. 1058, 1017; 279).

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[10]These findings were based on the credited testimony of employee Zimmerman. O'Donnell testified that he did not recall the conversation (A. 1016, n. 12; 446).

That same day, President Beaver summoned employee Charles Earnest to his office and asked him if he had heard rumors about starting a union. When Earnest replied that he had not, Beaver stated that there were rumors to the effect that the "fellows" wanted a union, and asked whether Earnest was for it. Earnest stated that he did not know, never having worked for a unionized employer. Beaver then inquired whether he had signed a union card. When Earnest admitted that he had, Beaver stated that he never heard of a union "yet that went along with what they said when they—the union would come in." He advised Earnest to think it over (A. 1017; 264-265, 271-274). The following day, September 20, Beaver again called Earnest into his office and asked if he had thought it over. Earnest again stated that he did not know what to think because he had never worked in a union plant (A. 1058-1059, 1017; 265).

That same day Supervisor William Knepp approached employee Seth Smith in the garage and asked if he had heard any rumors about a union. Although Smith had previously signed a union card, he also disclaimed knowledge (A. 1059, 1017, n. 18; 283-284).[11]

During the early morning of September 21, Beaver again addressed the assembled employees, reading from a speech that was at least partially prepared by his attorney. He stated that he deplored the situation and had heard a rumor about the possibility of a strike, in which event the bakery would operate and employees who wanted to work were welcome to do so (A. 1014; 170, 196-197, 211, 246, 287, 670, 708-711).

Soon after Beaver's speech, Company Vice President Dilliplane had a conversation with employee Jay Leister, in Beaver's office. Dilliplane asked

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[11] The testimony of Smith and Moore was uncontradicted (A. 1017, nn. 16, 18).

the employee whether he knew anything about his fellow employees' union activities. Although Leister was a member of the Union's organizing committee, he disclaimed knowledge but added that if the "fellows" walked out he would be with them. Dilliplane then told the employee that on a prior job he had personally dismissed 45 employees who had struck (A. 1016; 161, 243-244, 246-250, 254-258).[12]

Around this same time Foreman Lash summoned employee Charles Hoar from his work station to the cellar of the plant and asked him whether he knew anything about the union talk going on upstairs. Although this employee was also on the Union's organizing committee, he also disclaimed knowledge and asked why he had been questioned. Lash replied that there was a lot of discussion going on in the employee's corner (A. 1016; 162, 207-209).

That same day, a truckdriver reported to Foreman Lash that he was having trouble with his truck. Lash took employee Floyd Leister on a drive to check the truck. During the drive Lash asked Leister, "Do you know anything about the Union activity that is going around here?" When this employee also denied knowledge, Lash said, "Well, the Company suspects Charley Hoar is an instigator but we are not sure of this. Keep your ears open today and see what you can find out and let me know." Leister replied that he would (A. 1058, 1016; 197-198). Later that day, in the presence of Production Manager Gaudreau, Lash asked Leister "what [he] thought," to which Leister replied, "Well I don't know." Gaudreau then

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[12]This transcript shows, and the Examiner found, that Dilliplane testified he was referring to a "legal" strike when he mentioned the discharge of 45 strikers (A. 1016 n. 15; 455-458).

said, "I hope you boys don't strike because somebody will be sorry for it" (A. 1058, 1016; 198-199).[13]

That evening, just before departing, employee Earnest went to Beaver's office for his orders. Beaver advised him that there might be a strike and "that the fellows that went out would be out of their jobs and he was going to hire new [employees] in their place. . ." (A. 1017; 267-268).

c. The employees strike for recognition

Later in the day on September 21, the day of Beaver's second speech, Union representative Bacon called employee Beatty and, after advising him that he had been unable to reach Beaver by telephone, requested him to contact Beaver to arrange a meeting for that evening concerning recognition. Beatty, accompanied by employee Jack Zimmerman, attempted to see Beaver in the bakery, but they were met by Stuckey and the Company's attorney. Beatty informed them of his mission and was told by the attorney that the Company did not believe the Union represented a majority of the employees and that there was no need to arrange a meeting. Beatty then asserted that a card check would confirm the Union's majority status. Nothing further was said and employees Beatty and Jack Zimmerman left (A. 1014; 46, 134-135, 171, 187, 512).

Notwithstanding this assertion to the Union by his attorney, Company President Beaver testified, on direct examination, that he did not "express any questions concerning the majority representation to [union representative] Pointak" or to the Union until September 23, when the Company sent a formal telegram[14] to the Union expressing such a doubt

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[13]The testimony of Hoar and Leister as to these incidents was uncontradicted (A. 1016, n. 14).

[14]Inadvertently referred to as a "letter" in our typewritten brief.

(A. 1056; 662-664).[15] Beaver's explanation for his alleged doubt on September 23 was that he "felt that . . . being a small organization as we were and that we worked together closely that undoubtedly, and [he] had also spoke to some of the employees, and [he] felt without coercion or intimidation the majority of the employees had not signed cards for the Union" (A. 1056; 664-665). Further amplifying the reason for his doubt, Beaver stated that he "had read an article, under very similar circumstances as this where coercion and intimidation–the article said that these cards were ruled out when they were secured in this manner" (A. 1056; 665, 667-668).[16]

As a result of the Company's flat refusal to bargain, which Beatty reported to Union representative Bacon, another employee union meeting was called that evening and attended by over forty employees (A. 1014; 103-104, 163).[17] At the beginning of the meeting 16 more signed authorization cards were turned in to the Union, making a total of 47 signed cards in the Union's possession on that date out of a total of 59 to 66 employees in the unit found appropriate by the Board (*infra* pp. 26-32). At the meeting, Union Representative Bacon told the employees of his unsuccessful attempts to obtain recognition of the Union from their employer and the

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[15]As discussed *infra*, pp. 15-17, this telegram was not sent until two days after the employees struck in protest of their employer's failure to recognize their chosen collective bargaining representative. The tone and emphasis of this telegram also seem to indicate that the Company's asserted doubts were based on alleged acts of strike coercion by the Union and not on anything occurring before the strike (see A. 948).

[16]This article was given to Beaver by his counsel on September 16, at the meeting intended to map out campaign strategy to thwart the Union's forthcoming organizational efforts (A. 1056, n. 9; 665, 667-668, 705, 707-708).

[17]Witnesses' estimates of employee attendance ranged between 40 and 50 (A. 47, 103-104, 163).

opposition of the Company's attorney. The employees then voted unanimously to demand recognition that night and the meeting was recessed to afford Bacon an opportunity to telephone Beaver for the purpose of arranging a meeting (A. 1014; 52, 103-104). Bacon called the bakery and was advised by the girl who answered the telephone that Beaver was not available. Bacon told her that a strike was imminent unless Beaver could be reached. The girl promised to call back within 15 minutes. Shortly thereafter she called back and told Bacon that the Company was not going to recognize the Union whether or not its employees struck. After Bacon reported this development to a reconvened meeting of employees, they voted unanimously to strike for recognition. The meeting was then adjourned and Bacon and the employees went to the bakery (A. 1015; 52-53, 104, 110). Upon reaching the bakery the employees set up a picket line and carried signs made by the employees, reading "Beaver Bros. on Strike."

When Bacon reached the bakery parking lot he was met by Beaver, who was accompanied by Pinkerton guards. Bacon told Beaver that the strike would not have occurred if the Company had recognized its employees' bargaining agent, and then asked, "Is there any way we can settle this matter?" (A. 1015; 53-54, 104, 683). Beaver replied that "as far as I know it [is] in the hands of the attorneys. . ." (A. 1015; 683). At about 2 a.m. that morning Bacon sent a telegram to Beaver stating, *inter alia*, as follows:

> Your refusal to meet with me or talk to me over the the telephone left your employees no alternative but to demonstrate that the majority did want union representation by leaving their jobs that amounted to practically 100 percent of the employees we are seeking representation for. This telegram is to formally request that you sign a stipula-

> tion of recognition and to negotiate a collective bargaining agreement (A. 1015; 55, 947).

The following day the Company sent a reply telegram, composed by the Company's attorney, stating that it doubted the Union's majority status and that it had already petitioned for an election in the unit of employees "claimed" to be represented by the Union (A. 1015; 948).[18]

d. Seven employees are discharged as the strike ends

About a month later, on October 20, the Union sent the Company a telegram in which it stated the following:

> All of your employees who are presently protesting your unfair labor practice hereby unconditionally offer to return to work as of Thursday, October 21, 1965. Mr. John Beatty or Mr. Martin Bacon will contact your office for starting time of each worker at 11 AM Thursday, October 21 (A. 1030; 57-58, 949).

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[18]The Company did in fact file a petition for an election the next day (Case No. 6-RM-286, A. 961-982). However, its petition, unlike the Union's claim, requested an election in a unit of all employees except "Supervisors and Guards, as defined by the Act" (A. 1015, n. 11; 961-968, 1010-A). On October 19, a hearing was held in the matter, at which the Union again requested recognition on behalf of only production and maintenance employees. At the hearing, Local 776 of the International Brotherhood of Teamsters was permitted to intervene because it had requested recognition as the collective bargaining representative on behalf of the Company's transport drivers. Upon the filing of the complaints in the instant proceeding, the Board withheld further processing of the representation proceeding (A. 1015, n. 11; 658-659, 785-786, 961-968). As a general policy, the Board will not entertain a representation petition where unfair labor practice charges affecting the employees involved are concurrently pending, unless the charging party has waived the matter alleged in the charge as a basis for objecting to the election results. *Edward W. Schlachter Meat Co., Inc.*, 100 NLRB 1171, 1172 (1952); *Hensley Equipment Co.*, 121 NLRB 556, 569 (1958); *Furr's, Inc. v. N.L.R.B.*, 381 F.2d 562, 570 (C.A. 10, 1967), cert. denied, 389 U.S. 840; *N.L.R.B. v. Auto Ventshade, Inc.*, 276 F.2d 303, 307-308 (C.A. 5, 1960). The reason for this administrative policy is that unremedied unfair labor practices tend to impair the employees' freedom of choice in selecting a bargaining representative. Cf. *Columbia Pictures Corporation*, 81 NLRB 1313 (1949). See also, *Dayton Typographical Union v. N.L.R.B.*, 117 U.S. App. D.C. 91, 105, 326 F.2d 634, 648 (1963).

By reply telegram the Company agreed to reinstate all striking employees except employees Alan Coudriet, Richard Burge, John Beatty, Charles Hoar, Floyd Leister, Blair Kelley, and Gerald Goss because of alleged serious acts of strike misconduct (A. 1030; 711, 950). By reply telegram the Union rejected the Company's counter-offer, stating that its "offer was contingent on full employment and restoration of jobs to all employees presently protesting the unfair labor practice." The Union stated that it could not accept the Company's unilateral determination concerning the strike misconduct and further suggested that the matter be subsequently resolved at a "proper hearing" (A. 1030; 952). Meanwhile letters of discharge, dated October 22, for alleged strike misconduct were sent to the seven above named employees (A. 1030; 60, 712, 959).[19] On December 28, the Union again sent a telegram requesting reinstatement of "all employees now on strike" and unconditionally offering to return to work (A. 1030; 955). The Company promptly responded that it "unconditionally accepted" the "unconditional offer to return to work" (A. 1030; 956). All striking employees thereupon returned to work except the seven discharged employees whom the Company had refused to reinstate.

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by threatening and coercively interrogating its employees concerning their Union activities. The Board also found that the Union had attained a majority of valid authorization cards in the unit found appropriate, consisting of the Company's production and maintenance employees.

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[19]Beaver testified that the decision to discharge these employees was made on the date the Company received the Union's request for reinstatement (A. 711-712).

The Board concluded that the Company's refusal to bargain was not motivated by a good faith doubt of majority and violated Section 8(a)(5) and (1) of the Act. The Board also concluded that the Company had violated Section 8(a)(3) and (1) of the Act by discharging employees Blair Kelley, Richard Burge and Floyd Leister. Finally, the Board concluded that employees Beatty, Hoar, Goss and Coudriet were properly discharged for engaging in flagrant acts of strike misconduct unprotected by the Act, and were not entitled to reinstatement even though the strike was caused by their employer's unfair labor practices.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act. Affirmatively, the Company is directed to offer reinstatement to employees Kelley, Burge, and Leister, and reimburse them for any loss of earnings resulting from the Company's discrimination against them; to bargain collectively, upon request, with the Union; and to post appropriate notices (A. 1038-1041, 1061-1063).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S CONCLUSION THAT THE COMPANY REACTED TO THE UNION'S ORGANIZATIONAL ACTIVITIES WITH A CAMPAIGN OF THREATS AND COERCIVE INTERROGATIONS DIRECTED AGAINST ITS EMPLOYEES, THEREBY VIOLATING SECTION 8(a)(1) OF THE ACT

The Company was well aware of its employees' union activity from its inception. Consequently, the Company's top management—i.e., Beaver, Stuckey and Dilliplane—met with their attorney to discuss how to deal with the situation (*supra*, p. 9). The Attorney supplied legal advice and written material to guide them in dealing with the Union, including notes

for a speech which President Beaver delivered the next day to the assembled employees. In the speech Beaver indicated that the Company opposed unionization, outlined the benefits that they had received without unionization, and cautioned them about signing authorization cards because they would "be authorizing this Union to be your bargaining agent" and that "there is no obligation to go to a union meeting, or let their people bother you at home" (*supra*, p. 9).

As discussed *infra*, pp. 39-43, the next day, after the employees had attended their first union meeting and signed authorization cards, the Union contacted Beaver and requested recognition, which Beaver refused. Thereupon, the tenor of the Company's anti-union campaign immediately changed from forceful opposition to a full-scale unlawful campaign involving the full range of the Company's supervisory and management complement.

Thus, when employee Jack Zimmerman returned to work after attending the first union meeting he was immediately confronted by Foreman Robert O'Donnell, who asked if he had signed a union card, or if he knew who was instigating the union's organizational efforts. Apparently in fear of reprisal, the employee falsely denied any knowledge or involvement. O'Donnell stated that he thought it was Beatty, and if it were, the Company would get rid of him. Foreman O'Donnell then reminded the employee of the incident during the summer when Zimmerman was summoned to Beaver's office and warned by his supervisors that unionization would mean fewer hours and less money for him (*supra*, p. 11).[20] Simi-

[20]As shown *supra*, p. 8, on that occasion Gaudreau and Stuckey had summoned Zimmerman into President Beaver's office, and in the presence of Beaver, told the employee that "there wouldn't be any good to have a Union and * * * [he] wouldn't be able to get as many hours and as much money with the Union."

larly, Production Manager Gaudreau approached employee Donald Moore at his work station and told the employee that he "heard the rumor that the Union was going around and wanted to know if [Moore] had anything in it, and then asked [him] if [he] had signed the card." Although he had signed, Moore also denied knowledge or involvement (*supra*, p. 11).

Around this same time Company President Beaver summoned employee Blair Kelley into Gaudreau's office and said, "I suppose you've been approached by someone with the card?" He told the employee that Union shops are based on 40-hour weeks and that Kelley, who worked a 60-hour week, ought to give the matter serious thought (*supra*, p. 11). That same day Company President Beaver summoned employee Charles Earnest to his office and asked if he had heard rumors about starting a union. When Earnest replied that he had not, Beaver said that such rumors were circulating and asked if the employee was for the Union. Earnest replied that he did not know, never having worked for a unionized employer. Beaver then asked if Earnest had signed a card. When the employee admitted signing a card, Beaver stated he had never heard of a union "yet that went along with what they said when they—the union would come in."[21] That same day supervisor William Knepp approached employee Seth Smith and he too asked if the employee had heard any rumors about a union. Smith also falsely denied knowledge (*supra*, p. 12).

On September 21, after Beaver's second speech to the employees, Company Vice President Dilliplane asked employee Jay Leister if he knew what was going on concerning the Union. Although Leister was a member of the Union organizing committee, he too disclaimed involvement.

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[21] The same parties had a similar conversation the next day.

Dilliplane then told the employee that while working for another employer he had personally dismissed 45 striking employees (*supra*, pp. 12-13).

Around this same time Foreman Lash summoned employees Charles Hoar to the plant cellar, where he asked the employee if he knew anything about the union talk going on. Although Hoar was also a member of the organizing committee, he too disclaimed knowledge and asked why he was being questioned. Lash replied that there was a lot of discussion in Hoar's corner (*supra*, p. 13). That same day, Lash also asked employee Floyd Leister if he knew "anything about the Union activity." When Leister also denied knowledge, Lash said, "Well the Company suspects Charley Hoar is an instigator but we are not sure of this. Keep your ears open today and see what you can find out and let me know." Later that day, in Gaudreau's presence, Lash asked Leister "what [he] thought," to which Leister replied, "Well I don't know." Gaudreau then said, "I hope you boys don't strike because somebody will be sorry for it." That evening, when employee Earnest went to Beaver's office for his orders, Beaver advised him that there might be a strike and that "the fellows that went out would be out of their jobs and he was going to hire new [employees] in their places * * *" (*supra*, pp. 13-14).

This record evidence amply warranted the Board's conclusion that the Company threatened its employees with reprisals for their union activity, in violation of Section 8(a)(1) of the Act.[22] Moreover, the Company like-

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[22] *General Teamsters, Chauffeurs and Helpers, Local Union No. 782 v. N.L.R.B.*, 126 U.S. App. D.C. 1, 3, 4, 373 F.2d 661, 663, 664 (1967), cert. denied, 389 U.S. 837; *Amalgamated Clothing Workers v. N.L.R.B.*, 120 U.S. App. D.C. 47, 48, 343 F.2d 329, 330 (1965); *Joy Silk Mills v. N.L.R.B.*, 87 U.S. App. D.C. 360, 368, 185 F.2d 732, 740 (1950), cert. denied, 341 U.S. 914; *N.L.R.B. v. My Store, Inc.*, 345 F.2d 494, 496-497 (C.A. 7, 1965), cert. denied, 382 U.S. 927; *N.L.R.B. v. Schill Steel*

wise violated the Act by coupling with such threats, repeated and pointed inquiries about the employees' own union activity and the identity of instigators—inquiries to which the employees prudently gave untruthful replies inasmuch as such interrogation "reasonably causes the interrogated employees to fear that the purpose of ascertaining the identity of union supporters is to impose reprisals on them" (A. 1018). As stated by this Court in *Joy Silk Mills v. N.L.R.B., supra,* 87 U.S. App. D.C. at 368, 185 F.2d at 740:

> Interrogation by supervisory employees as to Union sympathies carries with it at least the aroma of coercion. Here the questioning was coupled not only with the supervisor's expression of extreme distaste for unionization, but also with veiled threats as to future benefits and job security.[23]

As shown above, the Company responded to its employees' organizational efforts with threats and coercive interrogations obviously designed to thwart unionization and find out the identity of the leaders in the organizational drive. These unlawful threats and coercive interrogations were not mere cases of isolated anti-union exuberance by the few minor supervisors but rather involved the Company's president, vice president, and

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Products, Inc., 340 F.2d 568, 571 (C.A. 5, 1965); *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 762 (C.A. 6, 1965); *N.L.R.B. v. Barney's Supercenter, Inc.*, 296 F.2d 91, 94 (C.A. 3, 1961).

[23]Accord: *Amalgamated Clothing Workers of America v. N.L.R.B.*, 125 U.S. App. D.C. 275, 278, 371 F.2d 740, 743 (1966); *Amalgamated Clothing Workers of America v. N.L.R.B.*, 124 U.S. App. D.C. 365, 378, 365 F.2d 898, 911 (1966); *Truck Drivers and Helpers Local No. 728 v. N.L.R.B.*, 124 U.S. App. D.C. 289, 290, 364 F.2d 682, 683 (1966); *N.L.R.B. v. Camco, Inc.*, 340 F.2d 803, 804-805 (C.A. 5, 1965), cert. denied, 382 U.S. 926; *Daniel Const. Co. v. N.L.R.B.*, 341 F.2d 805, 813 (C.A. 4, 1965), cert. denied, 382 U.S. 831; *N.L.R.B. v. My Store, Inc.*, 345 F.2d 494, 496-497 (C.A. 7, 1965), cert. denied, 382 U.S. 927; *N.L.R.B. v. Economy Food Center, Inc.*, 333 F.2d 468 (C.A. 7, 1964).

production manager as well as three supervisors. Thus, the broad-gauged nature of this campaign of coercion, and the Company's previous history of opposition to unionization, amply demonstrate the hostile attitude with which management viewed its employees' concerted activities.

II. THE BOARD'S CONCLUSION THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE

A. Legal Principles

The duty to bargain is not dependent on a Board election and certification. Alternative modes of proof of a union's majority status may sufficiently impose a bargaining duty upon an employer. Thus, when a majority of employees in an appropriate unit sign union authorization cards, an employer violates Section 8(a)(5) if he insists on an election and refuses to recognize and bargain with the union unless such refusal is motivated by a good faith doubt of the Union's majority status. See e.g., *International Union, United A., A., & A. Impl. Workers of America v. N.L.R.B.*, 129 U.S. App. D.C. 196, 203, 392 F.2d 801, 808 (1967), cert. denied, 392 U.S. 906; *Amalgamated Clothing Workers of America v. N.L.R.B.*, 124 U.S. App. D.C. 365, 373, 365 F.2d 898, 906 (1966); *Joy Silk Mills v. N.L.R.B.*, 87 U.S.App.D.C. 360, 369, 185 F.2d 732, 741 (1950), cert. denied, 341 U.S. 914; *Snow v. N.L.R.B.*, 308 F.2d 687, 690 (C.A. 9, 1962); *Jas. H. Matthews & Co. v. N.L.R.B.*, 354 F.2d 432, 436 (C.A. 8, 1966), cert. denied, 384 U.S. 1002; *N.L.R.B. v. Sinclair Co.*, 397 F.2d 157, 161-162 (C.A. 1, 1968), cert. granted, 393 U.S. 997; see also *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72 (1956).[24] A

[24] *Contra: N.L.R.B. v. Gissel Packing Co., Inc.*, 398 F.2d 336 (C.A. 4, 1968), cert. granted, 393 U.S. 997; *N.L.R.B. v. Heck's, Inc.*, 398 F.2d 337 (C.A. 4, 1968), cert. granted, 393 U.S. 997; *General Steel Products, Inc. v. N.L.R.B.*, 398 F.2d 339 (C.A. 4, 1968), cert. granted, 393 U.S. 997.

highly probative factor indicating a lack of good faith is a desire to gain time in order to undermine the Union's majority. *Joy Silk Mills v. N.L.R.B., supra,* 87 U.S. App. D.C., at 369, 185 F.2d at 741. "But, proof of such motivation is not essential in order to make such a finding if lack of a reasonable doubt is established in some other way." *Snow v. N.L.R.B., supra,* 308 F.2d at 693. Thus, the refusal by an employer to accept any evidence proffered by a union of its majority status also may indicate that the employer's real reason for refusing recognition is not a good faith doubt of majority.[25]

We show below that the Board's unit determination was proper, and that a majority of the employees in the unit validly designated the Union. We further show that the Company was not motivated by doubt of the Union's majority status when it refused to bargain because the record establishes that it had no reasonable basis for such a doubt, it refused to accept proffered evidence of the Union's majority without questioning the fact of majority and it engaged in unlawful conduct designed to undermine such majority.

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[25]E.g., *N.L.R.B. v. Purity Food Stores,* 354 F.2d 926, 927 (C.A. 1, 1965); *Jas. H. Matthews & Co. v. N.L.R.B., supra,* 354 F.2d at 436; *Irving Air Chute Co. v. N.L.R.B.,* 350 F.2d 176, 182 (C.A. 2, 1965); *N.L.R.B. v. Elliott Williams Co., Inc.,* 345 F.2d 460 (C.A. 7, 1965); *N.L.R.B. v. George Groh & Sons,* 329 F.2d 265, 269 (C.A. 10, 1964); *N.L.R.B. v. New Era Die Co.,* 118 F.2d 500 (C.A. 3, 1941).

B. The Board did not abuse its discretion in concluding that a unit limited to the Company's production and maintenance employees is appropriate for collective bargaining

Section 9(b) of the Act provides, *inter alia*, that the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *." The standard for judicial review of the Board's unit determination was succinctly stated by this Court in *Retail Wholesale & Department Store Union v. N.L.R.B.*, 128 U.S. App. D.C. 41, 45, 385 F.2d 301, 305 (1967):

> Once the Board determines the unit appropriate to insure employees the fullest freedom in exercising the rights guaranteed by the Act, absent irrational and arbitrary action by the Board the matter is beyond the power of review. *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 491, 67 S. Ct. 789, 793, 91 L.Ed. 1040 (1967); *May Dept. Stores Co. v. N.L.R.B.*, 326 U.S. 376, 380, 66 S. Ct. 203, 90 L.Ed 145 (1945). The issue as to what unit is appropriate for bargaining "is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed."[26]

In the instant case the Board found (A. 1022, 1061) that a unit limited to the Company's production and maintenance employees was appropriate for purposes of collective bargaining. The Board excluded from the unit driver-salesmen and transport drivers (also referred to in the record as truckdrivers). As detailed in the Examiner's decision (A. 1019-

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[26]Accord: e.g., *S. D. Warren Co. v. N.L.R.B.*, 353 F.2d 494, 497-498 (C.A. 1, 1965), cert. denied, 383 U.S. 958; *N.L.R.B. v. Burroughs Corp.*, 261 F.2d 463, 466 (C.A. 2, 1958); *N.L.R.B. v. J. W. Rex Co.*, 243 F.2d 356, 359 (C.A. 3, 1957).

1022), the production and maintenance employees' interests, functions, and working conditions are markedly different from those of the transport drivers and driver-salesmen. Thus, the Company's transport drivers and the 23 driver-salesmen work the vast majority of their time out of the plant on their respective trucks selling, picking up and delivering bakery goods, whereas production and maintenance employees work in the plant and are engaged directly in the baking process (A. 1020; 212, 217, 520-526, 546-551, 594-598, Tr. 247, 519, 552). Furthermore, there is very little interchange or even contact between these groups and there is no evidence that any transport driver or driver-salesman ever engaged in any of the actual baking process. The only time drivers regularly come into the plant is during loading and unloading operations (A. 1020; 214, 216-217). Production employees wear different colored uniforms than either class of drivers and have a different supervisor (A. 1020; 214-216, 219, 525-526, 548-551, Tr. 552).[27] Unlike the production employees or transport drivers, the driver-salesmen are bonded and are paid partly on a commission instead of entirely on an hourly wage basis (A. 1020; 216, 219, 548).

Added to these patent divergencies of functions and working conditions is the fact that the Union, from the inception of its organizational campaign, sought to represent the production and maintenance employees only (*infra*, p. 50). Also, the record indicates that toward the end of September 1967 the Teamsters Union had begun its own organization cam-

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[27]All employees did have the same fringe benefits. The transport drivers work hours similar to those of the production employees but the 13 driver salesmen do not (A. 1020; 212-213, 216-219, 526, 549, 625-626).

paign among the Company's transport drivers and on September 30 had requested a Board election (A. 1019; 979-981).[28]

In sum, the marked dissimilarities in working conditions and functions between production and maintenance employees on the one hand and drivers on the other, coupled with the fact that the Union did not seek to represent any drivers whereas the Teamsters were seeking to represent at least one group of drivers (the transport drivers), are factors strongly supporting the Board's determination that only production and maintenance employees should be included in the unit.[29] We submit that the Board's unit determination is wholly rational and is in no way an abuse of discretion.

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[28] Owing to the instant proceedings, this petition has not been processed further (A. 1015, n. 11). See p. 17, n. 18, *supra*.

[29] *E. H. Koester Bakery Co.*, 136 NLRB 1006 (1962); *Marks Oxygen Co.*, 147 NLRB 228 (1964); *Ballentine Packing Co., Inc.*, 132 NLRB 923 (1961); *Coca-Cola Bottling Company of Baltimore*, 156 NLRB 450 (1965); *Gunzenhausen Baking, Inc.*, 137 NLRB 1613, 1615-1616 (1962). As this Court said in *Retail, Wholesale & Department Store Union, supra*, 128 U.S. App. D.C. at 46, 385 F.2d at 306, "* * * the extent of union organization is a consideration in determining the appropriate unit '* * * [B]oth the language and legislative history of § 9(c)(5) demonstrate that the provision was not intended to prohibit the Board from considering the extent of organization as one factor, although not the controlling factor, in its unit determination.' *N.L.R.B. v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441-442 (1965)."

In the following cases which the Company cited to the Board, the truckdrivers who were included in the unit to a substantial extent worked together with the remaining unit employees and performed the same work. *Tops Chemical Co.*, 137 NLRB 736 (1962); *Taylor Baking Co.*, 143 NLRB 566, 568 (1963); *Standard Oil Co.*, 147 NLRB 1226 (1964); *Sylvania Electric Products, Inc.*, 135 NLRB 768, 769-770 (1962).

C. A majority of the employees in the bargaining unit validly designated the Union as their collective bargaining representative.

1. *The union authorization cards in evidence were properly authenticated and admitted*

There were two hearings in the instant case at which 47 union authorization cards signed by employees in the unit were introduced into evidence.[30] At the first hearing 15 unit employees whose purported signatures appeared on these cards testified that they had signed union authorization cards.[31] At the reopened hearing 29 unit employees appeared and each testified that he signed the union authorization card bearing his purported signature (A. 1045).[32] There can, of course, be no question that

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[30] A 48th card was withdrawn at the reopened hearing because Clair Laub, whose purported signature it bore, had died by the time of the reopened hearing, and his son, James Laub, testified that he had signed his father's card (A. 881-883, 900).

[31] 1. Gerald Goss (A. 109, 941, GCX 2(o))
2. Jack Zimmerman (A. 127, 946, GCX 2(uu))
3. John Beatty (A. 159-160, 939, GCX 2(c))
4. Floyd Leister (A. 194, 942, GCX 2(x))
5. Seth Smith (A. 283, 945, GCX 2(nn))
6. Benjamin Folk (A. 287-288, 941, GCX 2(m))
7. John Rothrock (A. 648, 945, GCX 2(kk))
8. Richard Grove (A. 434-437, 941, GCX 2(q))
9. John Paden (A. 311, 944, GCX 2(ff))
10. Gary Rhodes (A. 339, 944, GCX 2(ii))
11. Gary Marsh (A. 355, 943, GCX 2(cc)) (Marsh denied signing a card but admitted that the signature on the card looked like his (A. 1029; 354-355, Tr. 360). The Board discredited his denial, but for other reasons did not count his card (*ibid.*)).
12. Dorothy Allenbaugh (Tr. 142-148, A. 145, 153, 375-376, 939, GCX 2(a)) (Her card was actually turned in a few days after the second union meeting).
13. Lehman Gilbert (A. 303, 941, GCX 2(n))
14. William Russell (A. 390-391, 791, 945, GCX 2(11))

[32] 1. Donald Barlett (A. 878-879, 939, GCX 2(b))
2. Robert Beatty (A. 880, 939, GCX 2(d))

[continued]

these 44 cards were sufficiently authenticated. *Aero Corp.*, 149 NLRB 1283, 1291 (1964), enforced, 124 U.S. App. D.C. 215, 363 F.2d 702 (1966), cert. denied, 385 U.S. 973.

The parties stipulated that at the time of the reopened hearing Kenneth Stine, Kenneth Stewart and Allen Coudriet were serving in the Armed

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3. Donald V. Brown (A. 883-884, 939, GCX 2(f))
4. Richard Burge (A. 889-890, 940, GCX 2(g))
5. William R. Condron (A. 879, 940, GCX 2(n))
6. Glen Crownover (A. 854-855, 940, GCX 2(j))
7. John Davies (A. 883, 940, GCX 2(k))
8. Ray Ferrell (A. 897-898, 940, GCX 2(*l*)
9. Trevor E. Goss (A. 895, 941, GCX 2(p))
10. David W. Haines (A. 895-896, 941, GCX 2(r))
11. Ronald Heister (A. 888-889, 942, GCX 2(s))
12. Charles Hoar (A. 846, 942, GCX 2(t))
13. Samuel J. Kelley (A. 896-897, 942, GCX 2(u))
14. James Laub (A. 900, 942, GCX 2(w))
15. George Lukens (A. 902-903, 911-912, 917, 943, GCX 2(y)). (This employee testified that he himself did not sign his card because his hand was sore, but his card was signed at his request and in his presence by his brother Robert Lukens (A. 1045; 902, 908-912, 914-917, 943, GCX 2(y)). We submit that this card was properly admitted into evidence. *Lifetime Door Company*, 158 NLRB 13, 21 (1966), enforced 390 F.2d 272 (C.A. 4, 1968).)
16. Robert Lukens (A. 902-905, 907, 943, GCX 2(z))
17. Clinton McConnaughy (A. 888, 943, GCX 2(aa))
18. Malcolm McDonald (A. 886, 943, GCX 2(bb))
19. Donald Moore (A. 276-277, 885-886, 943, GCX 2(dd))
20. Ronald B. North (A. 890, 944, GCX 2(ee))
21. Ronald Pandel (A. 894, 944, GCX 2(gg))
22. William Pandel (A. 890-891, 944, GCX 2(hh))
23. Sheldon Romig (A. 926, 944, GCX 2(jj))
24. Floyd Semons (A. 899, 945, GCX 2(mm))
25. Gerald Stine (A. 887, 945, GCX 2(pp))
26. Ronald Stone (A. 893-894, 946, GCX 2(rr))
27. Christ Yoder (A. 881, 946, GCX 2(ss))
28. John Young (A. 891-892, 946, GCX 2(tt))
29. Jerry Zimmerman (A. 898, 946, GCX 2(vv))

Forces in Viet Nam (A. 1046; 834). Their W-4 forms maintained by the Company in the regular course of business were produced and admitted into evidence as authentic specimens of their handwriting. A duly qualified handwriting expert testified that he concluded that the signatures on the union authorization cards in evidence bearing the names of these employees were signed by the same individuals that signed the W-4 forms (A. 1046; 858-864, 940, 945, 946, 1006-1010, GCX 2(i), 2(oo), 2(qq)). These three cards authenticated by comparison of handwriting were also properly authenticated and admitted. *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 179-180 (C.A. 2, 1962), cert. denied, 370 U.S. 919; *N.L.R.B. v. Hunter Engineering Co.*, 215 F.2d 916, 923 (C.A. 8, 1954); *Aero Corp.*, 149 NLRB 1283, 1291, 1352-1354, enfd., 124 U.S. App. D.C. 215, 363 F.2d 702 (1966), cert. denied, 385 U.S. 973; see also *Reining v. U.S.*, 167 F.2d 362, 364 (C.A. 5, 1948). Indeed, the Company neither alleged nor proved any irregularity in the execution of the cards even though all the employees, including the three employees who subsequently became unavailable because of military service, were available as witnesses to it either at the original or reopened hearings.

The Company's argument before the Board, that the dates of execution of the cards in evidence were not properly established, is without merit. The uncontradicted testimony of Union Representative Bacon and employee John Beatty clearly establishes that all the cards were in the Union's possession and dated by Bacon, Beatty and employee Charles Hoar, during the recess of the Union meeting on September 21 (*supra*, pp. 10, 15, *infra* p. 32 n. 34). It is neither unusual nor improper to establish the date by which a card must have been executed by reference to an event that naturally stands out in the minds of the witnesses, such as (in this

case) a union meeting held for the purpose of calling a strike because the employer is refusing recognition. See e.g., *Aero Corp.*, 149 NLRB 1283, 1291, 1352-1354 (1966), enforced, 124 U.S. App. D.C. 215, 363 F.2d 702 (1966), cert. denied, 385 U.S. 973.

2. *The Union obtained a substantial majority of voluntarily executed authorization cards from unit employees*

The appropriate unit here consists of no more than 66 employees (but at least 59).[33] The Board found that by September 21 (the second time that the Union requested and the Company refused recognition) at least 42 of these employees (an overwhelming majority) had, by executing authorization cards, validly authorized the Union to represent them.[34] We submit that the record evidence amply supports this finding.

As shown in the statement (*supra*, p. 9), the day before the first Union meeting Company President Beaver warned his assembled employees

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[33]The parties agreed that the 51 employees listed at A. 1022, n. 27, were included in the unit found appropriate (A. 1022, n. 27; 260-261, 679). The Company contended that 15 more employees, none of whom had signed a union card, should also be included. The Board agreed with the Company that 8 of these, listed at A. 1026, should also be included, and found it unnecessary to pass on the Company's contention that 7 more (Ralph VanArt, Russell Fultz, Harold Leister, Clair Gingrich, Robert Paige, Dave Weaver, Jay Leister) should also be included in the unit, because their unit placement could not affect the Union's majority status (A. 1060, n. 12).

[34]Because of the Union's clear majority on September 21, the date of its second bargaining demand, there is little significance to the question of the Union's majority at the time of its initial demand on September 18 (see pp. 40-41, *infra*). Because the cards signed during the union meetings held on these respective dates were commingled before being dated, they fail to reveal the date on which they were actually executed (A. 1053, n. 1, 2; 22-24, 47-50, 70-73, 97, 162-163, 194, 226). As to whether any of the 31 cards signed at the first meeting (where no roll was taken) were signed by non-unit personnel (truckdrivers), the testimony is mostly speculative, and the individuals in question signed Teamsters cards a few days later (A. 180-181, 280, 387-389). All of the cards received into evidence were signed by unit employees.

that "there is no obligation to go to a union meeting, or let these people bother you at home" and cautioned them that they would "be authorizing this union to be your bargaining agent" if they signed a union authorization card. At the Union meeting the next day the authorization card was read aloud to the assembled employees (*supra*, p. 10). The card unambiguously states (A. 939-946):

> I, the undersigned employee of the _____
> of _____ _____
> (City) (State)
> hereby authorize the American Bakery and Confectionery Workers International Union, AFL-CIO, Local ____, as my exclusive bargaining agent respective to wages, hours, and working conditions, and with authority to file a petition for bargaining relative to union security between myself and the above-mentioned company.

The Company neither alleged nor proved any misrepresentation made to employees concerning the use to which the cards would be put.[35]

The employees' action in executing these unambiguous union authorization cards plainly warrants the inference, at least *prima facie*, that the employees meant to authorize the Union to act as their collective bargaining representative. As the Board said in *Levi Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1338, 1341 (1968):

> Where a card on its face clearly declares a purpose to designate the union, the card itself effectively advises the employee of that purpose, * * *. An employee who signs such a card may perhaps not understand all the legal ramifications that may follow his signing, but if he can read he is at least aware that by his act of signing he is effectuating

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[35] See *International Union United A.A.&A. Impl. Workers v. N.L.R.B.*, 129 U.S. App. D.C. 196, 201, 392 F.2d 801, 806 (1967), cert. denied, 392 U.S. 906; *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F.2d 917, 920-921 (C.A. 6, 1965), and cases cited; *Jas. J. Matthews & Co. v. N.L.R.B.*, *supra*, 345 F.2d at 436-438.

> the authorization the card declares. To assume that the employee does not intend at least that much would be to downgrade his intelligence or charge him with irresponsibility.

The Board justifiably rejected the Company's contention that all 47 of the authorization cards were tainted by the remarks which were made to 5 employees before they signed. The Company relied on evidence that 3 employees (Gary Marsh, John Paden and Gary Rhodes) were threatened with loss of their jobs by fellow employee John Beatty if they refused to sign (A. 1029; 310-311, 338-339); that another (Lester Bobb, Jr.) testified that he was told by fellow employees when the strike began that "there was no use of [his] going to work because * * * [he] was not going to get in, that they were out here one hundred percent and they were on strike" (A. 1029; 301) (but Bobb also testified to pressures in connection with signing a card on September 16, two days before any employee even had cards and before the Union had even met with the employees (A. 1055, n. 6; 160, 298, 306-307, 770-771)); and that according to Bobb a fifth (Lehman Gilbert) signed after Bobb had relayed the foregoing conversation (A. 1029; 302-303).[36] However, the impact of such remarks even on the particular employees to whom they were addressed was limited, to say the least. Thus, at least three of these employees never attempted to revoke their cards, notwithstanding specific assurances by management to two of them that failure to sign a union card would not endanger their jobs (A. 1054; 313, 322, 341-342, 380);[37]

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[36] Gilbert's version of the conversation as relayed was, "* * * you might as well sign the card. They pretty near one hundred percent signed it up" (A. 379).

[37] Indeed, employee Paden testified as a Company witness that when Beatty had solicited his card he had told Beatty that he "didn't think [Beatty] could deprive [him] of a job if [he] didn't sign a union card" (A. 321).

and three of them joined the recognition strike on September 20 (A. 1054; 313, 322, 339, 341-342, 380-382). Indeed, employee Gilbert testified that he "signed that card of * * * [his] own free will," had never "tried to take the card back," and had picketed throughout the strike (A. 380-382).[38] The total absence of any evidence that the Union's officials encouraged or even knew about these alleged tactics used by the employee solicitors (A. 1054) both militates against any inference that similar, unspecified conduct was directed against other, unidentified card-signers, and diminishes the likelihood that rank-and-file employees' threats of reprisals by the Union would be taken seriously.[39]

Moreover, the record shows that 31 employees attended the September 18 meeting; between 40 and 50 employees attended the September 21 meeting, where they voted to strike if the Company repeated its September 18 refusal to bargain; and all employees at that meeting, after being informed of the Company's second refusal to bargain with the Union, agreed to strike and joined the picket line (*supra*, pp. 9-10, 15-16). In light of all the above evidence indicating that the employees clearly understood what they were doing and voluntarily supported the Union, we submit that the little evidence of questionable pressure may well leave unscathed the cards of the five employees who actually learned of these remarks and does not in any way taint the remainder. Clearly, "such evidence * * *

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[38]Cf. *N.L.R.B. v. World Carpets of New York*, 403 F.2d 408, 411-412 (C.A. 2, 1968); *N.L.R.B. v. Merrill*, 388 F.2d 514, 520 (C.A. 10, 1968); *International Union, A.A.&A. Impl. Workers, supra*, 392 F.2d at 808, n. 2; *N.L.R.B. v. Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851, 855 (C.A. 1, 1967).

[39]See, *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958); *Shoreline Enterprises v. N.L.R.B.*, 262 F.2d 933, 942 (C.A. 5, 1959); *Manning, Maxwell & Moore v. N.L.R.B.*, 324 F.2d 857, 858 (C.A. 5, 1963); *N.L.R.B. v. Myca Products*, 352 F.2d 511 (C.A. 6, 1965).

did not demonstrate pervasive [conduct] by the Union sufficient to cast doubt upon the validity of the remaining cards." *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (C.A. 7, 1967). See also, *N.L.R.B. v. H.& H. Plastics Mfg. Co.*, 389 F.2d 678, 682-683 (C.A. 6, 1968); *N.L.R.B. v. Consolidated Rendering Co.*, 386 F.2d 699, 703 (C.A. 2, 1967); *N.L.R.B. v. Gotham Shoe Co.*, 359 F.2d 684, 686 (C. A. 2, 1967).[40] The Company has failed to show that the Union's large majority was tainted by coercion. In the absence of such proof the Company cannot rely on a presumption based only on the typical overzealousness and enthusiasm of a few employees for an excuse for its own refusal to bargain. Indeed, as we show *infra* pp. 39-46, the Company's refusal to bargain was not based on any knowledge of coercion, but rather was designed to gain time to undermine the Union.

In light of the Company's proposed issues No. 1(d)(1) and (2), the Board anticipates that the Company will argue that the Board's remarks concerning the employees' strike participation constituted reversible error. The Board's conclusions (A. 1054-1055) in this regard were proper and in no way prejudiced the Company. Thus, at the hearing General Counsel produced testimony that a large majority of the employees went out on strike on September 21, in an attempt to affirmatively show that the Union represented a majority of the employees in the unit (A. 1026 n. 32; 172-173). To offset this testimony the Company served a *subpoena duces*

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[40]The Board's reversal of the Examiner on this question is not significant, since it concerns essentially only the inference to be drawn from the facts as found by the Examiner. *Joy Silk Mills v. N.L.R.B.*, *supra*, 87 U.S. App. D.C. at 370, 185 F.2d at 742; *American Federation of Television and Radio Artists v. N.L.R.B.*, 129 U.S. App. D.C. 399, 405, 395 F.2d 622, 628 (1968).

tecum on the Union to produce its financial records as to who was paid strike benefits (A. 1026 n. 32; 825). The Union refused to comply and the hearing was adjourned to allow the Company an opportunity to request enforcement of the subpoena (A. 1026 n. 32; 828-829). The General Counsel and the Union thereupon each filed a motion to close the hearing, both agreeing that they "will not rely on any testimony presently in the record concerning the *number* of employees who may have supported the strike *for proof of the Union's majority representation* of the [Company's] employees in any appropriate unit at the time the Union made its request for recognition, but rel[y], and will rely, solely on the Union's authorization cards already in evidence to establish the Union's majority * * *" (emphasis added). The Examiner granted the motion to close the hearing over the Company's objection, on the ground that the evidence sought was no longer relevant or necessary because of the stipulation agreed to in the motion (A. 1026 n. 32).

The Board in no way violated this stipulation. The Board used the fact that 3 of the 5 allegedly coerced employees joined the strike, and the fact that "all the employees at the meeting, [on September 21] * * * agreed to strike and joined the picket line" (A. 1014-1015; 52, 103-104), not to show majority but to further negate the Company's argument that somehow all the cards were tainted by the statements made in the solicitation of the five above discussed cards. This in no way violates the stipulation not to rely on the *number* of employees on strike to *affirmatively* establish a majority (*cf. N.L.R.B. v. Barney's Supercenter, Inc.*, 296 F.2d 91, 94 (C.A. 3, 1961)), but goes only to the question of whether the majority already established by the cards and employee testimony was in some way infected by coercion. Indeed, the Board specifically based its

finding of a majority on the authorization cards. Thus the Board concluded that "* * * without counting the five cards allegedly obtained by coercion, the Union had 42 clearly valid cards, 12 more than a majority" (A. 1055).[41]

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[41] The parties' stipulation must be thus narrowly construed in view of the well settled principle that the fact-finder is "not bound by stipulations * * * of fact which appear contrary to the facts disclosed by the record." *Mead's Bakery v. C.I.R.*, 364 F.2d 101, 106 (C.A. 5, 1966). See also *Laughlin v. Berens*, 73 U.S. App. D.C. 136, 118 F.2d 193, 196 (1940). "Parties may by stipulation establish evidentiary facts to obviate the necessity of offering proof, but based thereon the Court must itself find the ultimate facts upon which the conclusion of law and judgment are based." *Platt v. United States*, 163 F.2d 165, 168 (C.A. 10, 1947). Accord: *Swift & Co. v. Hocking Valley Railway Co.*, 243 U.S. 281, 289 (1917); see also, *Furr's, Inc. v. N.L.R.B.*, 381 F.2d 562, 566 n. 8 (C.A. 10, 1967), cert. denied, 389 U.S. 840; *N.L.R.B. v. Elliott-Williams Co.*, 345 F.2d 460, 463 (C.A. 7, 1965); *N.L.R.B. v. Montgomery Ward & Co.*, 242 F.2d 497, 501 (C.A. 2, 1957), cert. denied, 355 U.S. 829. Thus, the parties could not by stipulation compel the Board to find that three of the allegedly coerced card-signers had *not* joined the strike when their own uncontradicted testimony showed that they had (*supra* p. 35) or that the employees had *not* voted unanimously to when the uncontradicted testimony showed that they did (*supra* p. 16); for such a stipulation would be "contrary to the facts disclosed by the record" (*Mead's Bakery, supra*). Similarly, the parties could not have bound the Board by a stipulation that the employees were coerced since that is an "ultimate fact upon which the conclusion of law and judgment are based." *Platt v. United States, supra.* Cf. *Thompson v. Graham*, 318 S.W.2d 102, 108 (Ct. Civ. App. Tex., 1958).

However, even assuming *arguendo* that the Board's use of this evidence had violated the stipulation, it is clear that the Board's decision rested almost entirely on other evidence, *i.e.*, the cards and employee testimony. Under such circumstances "the * * * [Board's] order would have substantial support in the evidence even though the * * * [number of employees on strike] were wholly disregarded." *Galter v. F.T.C.*, 186 F.2d 810, 814 (C.A. 7, 1951). Accord: *Glaziers' Local 558 v. N.L.R.B.*, ___ U.S. App. D.C. ___, 408 F.2d 197, 201 (1969). Moreover, the Company has not shown or alleged any prejudice resulting from the Board's use of the evidence. In this regard, it should be noted that the Company did not offer to introduce its employees' attendance record during the strike, their testimony, or any other affirmative evidence about the strike vote or the number of strikers. We submit that even if the Board had erred as claimed, such error should be "deemed to be insubstantial [and] the administrative order should be enforced." *N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro*, 374 F.2d 974, 981 (C.A. 9, 1967), cert. denied, 389 U.S. 913, and cases cited.

D. Substantial evidence on the whole record supports the Board's conclusion that the Company's refusal to bargain was not motivated by a good faith doubt of majority

The evidence in this case is wholly inconsistent with the Company's contention that its refusal to bargain was motivated by a good faith doubt about the Union's majority status in an appropriate unit. Rather, as the Board found and the evidence clearly shows, the Company "made clear its intention of not recognizing the Union under any circumstances" (A. 1057) and its accompanying "unlawful conduct had for its purpose the impeding and coercion of its employees in the exercise of their statutory rights" (A. 1059). See *Joy Silk Mills v. N.L.R.B., supra,* 87 U.S. App. D.C. at 369, 185 F.2d at 741. We show below that the Board's finding is amply supported by substantial evidence on the whole record.

Of course, "[s]tatements and acts of the Union or the employer cannot be viewed in isolation and events both prior and subsequent to the request by the Union may be examined in making [the] * * * determination" as to whether the Company had good faith concerning the Union's claimed majority. *N.L.R.B. v. Barney's Supercenter, Inc.,* 296 F.2d 91, 93 (C.A. 3, 1961).[42] Thus, the record shows that the Company had a background of unlawful and successful opposition to attempts by unions to organize its employees (*supra,* pp. 7-8). As detailed in the statement (*supra,* pp. 7-8), during the six-month period prior to the inception of the Union's organizational campaign, the Company's management, including President Gary Beaver, Production Manager Donald Gaudreau, General Manager William Stuckey and Foreman Russell Lash, had all coercively interrogated and threatened employees concerning their union activity.

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[42]Accord: *N.L.R.B. v. Consolidated Rendering Co.,* 386 F.2d 699, 704 (C.A. 2, 1967).

As shown in the statement (*supra*, p. 10), on September 18, immediately after the employees' first meeting with the Union, Union Representative Pointak telephoned Company President Beaver and requested recognition. Beaver's curt response was, "We don't recognize any unions" (*ibid.*). Thus "[t]here had been a flat turn-down of a clear request to bargain." *Scobell Chemical Co., Inc. v. N.L.R.B.*, 267 F.2d 922, 925 (C.A. 2, 1959). Union Representative Bacon, who was standing next to Pointak in the telephone booth, testified that Pointak told Beaver that he was willing to submit to a card check (*supra*, p. 10). Beaver then not only refused to recognize the Union but virtually precluded further dialogue between the parties by telling Bacon that he wanted them to make any further contacts through the distant New York law firm of his attorney (*supra*, p. 10).

As stated by this Court in *Local No. 152 v. N.L.R.B.*, 120 U.S. App. D.C. 25, 343 F.2d 307, 309 (1965):

> An employer violates Section 8(a)(5) when, as here, it rejects a Union's bargaining request, made in the honest but mistaken belief that a majority has been obtained without questioning the Union's representative status, and the Union does obtain a majority shortly after such request.

Accord: *Furr's Inc. v. N.L.R.B., supra*, 381 F.2d at 568 and n. 13; *Allegheny Pepsi-Cola Bottling Co. v. N.L.R.B.*, 312 F.2d 529, 532 (C.A. 3, 1962). And see *N.L.R.B. v. Barney's Supercenter, Inc.*, 296 F.2d 91, 93 (C.A. 3, 1961) and cases cited; *Louisville Typographical Union No. 10, etc. v. N.L.R.B.*, ___ U.S. App. D.C. ___, ___ F.2d ___, December 26, 1967, Nos. 20,691, 20,758, enforcing *per curiam Madison Courier, Inc.*, 162 NLRB 550, 598 (1967). Although as stated *supra*, p. 32, n. 34, the record is not completely clear as to whether the Union had a majority at the time of its first request on September 18, it is clear that the Union representative

honestly believed on that date that he had such a majority. Neither Union representative present at the first meeting was familiar with the employees present or knew whether they were unit employees, and therefore, neither could have known at that time whether any of the 31 authorization cards in their possession had been executed by non-unit employees. In any event, whether a majority existed as of that date is not crucial since by September 21, the date of the Union's second request for recognition, the Union had attained an overwhelming majority and the record refutes the Company's contention that it had a good faith doubt of majority as of that date.

As shown in the statement (*supra*, pp. 11-14, 20-24), the Company's immediate response to the Union's organizational efforts involved its top management as well as supervisors in numerous instances of coercive interrogations and threats aimed toward thwarting the employee's organizational efforts. Thus as detailed above (*supra*, pp. 11-14, and 20-24), Company President Beaver, Vice President Dilliplane, General Manager Stuckey, Production Manager Gaudreau, and Foremen Robert O'Donnell, William Knepp and Russell Lash, all took part in a campaign of unlawful threats and coercive interrogations of line employees clearly designed to forestall the organizational efforts of their employees and wheedle information as to the identity of the leading union adherents. "Under such conditions respondent's unfair labor practices can hardly be divorced from its attitude of non-recognition." *N.L.R.B. v. Taitel*, 261 F.2d 1, 5 (C.A. 7, 1958), cert. denied, 359 U.S. 944.[43]

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[43]Accord: e.g., *International Union United A.A.&A. Impl. Workers v. N.L.R.B.*, 124 U.S. App. D.C. 215, 219, 363 F.2d 702, 706 (1966), cert. denied, 385 U.S. 973; *Joy Silk Mills v. N.L.R.B., supra*, 87 U.S. App. D.C. at 369, 185 F.2d at 741; *N.L.R.B.*

Moreover, the evidence demonstrates that the Company's initial refusal, made by President Beaver, did not rest on any doubt as to majority status; he simply told the Union representative that "we don't recognize any unions" (*supra*, p. 10). Beaver admitted that he expressed no doubt of the Union's majority on September 18 (*supra*, p. 10). Thus, "it is clear that [the Company] * * * refused to bargain with the Union on that date without questioning either the validity of the cards or whether a majority of the employees in the unit favored the Union." *N.L.R.B. v. Big Ben Dept. Stores, Inc.*, 396 F.2d 78, 81 (C.A. 2, 1968). Beaver further testified that he did not "express any question concerning the majority representation to [Union Representative] Mr. Pointak," until September 23, two days after the strike had begun, when the Company sent a formal telegram to the Union (*supra*, pp. 14-15).[44] Beaver further explained that

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v. Purity Food Stores, 354 F.2d 926, 927 (C.A. 1, 1965); *Scobell Chemical Co. v. N.L.R.B.*, *supra*, 267 F.2d at 927; *Allegheny Pepsi-Cola Bottling Co. v. N.L.R.B.*, *supra*, 312 F.2d at 532; *Florence Printing Co. v. N.L.R.B.*, 333 F.2d 289, 292 (C.A. 4, 1964); *N.L.R.B. v. Cumberland Shoe Corp.*, *supra*, 351 F.2d at 921; *N.L.R.B. v. Economy Food Center, Inc.*, 333 F.2d 468, 472 (C.A. 7, 1964); *Jas. H. Matthews & Co. v. N.L.R.B.*, *supra*, 354 F.2d at 439.

[44]The whole tenor of the Company's telegram, which does not cite any specific conduct as the basis for doubting the Union's majority, seems to indicate that the Company's doubts of majority were entirely based on alleged post-demand strike misconduct. Thus, the telegram reads:

> AS WE ADVISED YOUR REPRESENTATIVES PREVIOUSLY WE DOUBT THAT YOUR UNION REPRESENTS AN COERCIVE [SIC] AND INFORMED MAJORITY OF OUR EMPLOYEES IN AN APPROPRIATE UNIT. WE HAVE SERIOUS DOUBTS THAT MOST OF THE EMPLOYEES WHO HAVE NOT REPORTED FOR WORK HAVE DONE SO OF THEIR OWN FREE WILL. IF YOU ARE A LEGITIMATE UNION YOU WILL CEASE YOUR COERCIVE TACTICS ON OUR EMPLOYEES. WE HAVE ALREADY FILED A PETITION WITH THE NATIONAL LABOR RELATIONS BOARD FOR AN ELECTION AMONGST THE UNIT OF EMPLOYEES YOU HAVE CLAIMED TO REPRESENT SO THAT OUR EMPLOYEES MAY EXPRESS THEIR TRUE FEELINGS WITHOUT PRESSURE.
>
> Guy Beaver, President Beaver Brothers Baking Co.

"[he] felt * * * being a small organization as we were and that we worked closely that undoubtedly, and [he] had also spoke to some employees and [he] felt without coercion or intimidation the majority of the employees had not signed union cards" (A. 1056; 664-665). In amplifying on the reason for his doubt, he testified that "he had read an article under very similar circumstances as this where coercion and intimidation—the article said that these cards were secured in this manner" (A. 665). This testimony, by the Company's President, who was clothed with the authority to recognize the Union, indicates that he had no real basis, other than sheer speculation about his small, loyal organization, for doubting the Union's claimed majority. See *N.L.R.B. v. Economy Food Center, Inc., supra,* 333 F.2d at 472.

The Board justifiably declined to accept the Company's contention that in rejecting the Union's bargaining demand it was motivated by employee reports of improper pressures exerted upon them to sign authorization cards. It is, of course, well settled that:

> The fact as to whether an employer entertained a genuine doubt that a union represents a majority of the employees is to be determined as of the time the employer refused to recognize the union. Once it is established that the employer entertained no genuine doubt of this kind at the time it refused to bargain an unfair labor practice has been established. The fact that, as it later developed, there was ground which created a genuine doubt at that time is then immaterial.[45]

Much of the evidence cited by the Company shows on its face that it did not come to the Company's attention until after the Company

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[45] *Snow v. N.L.R.B.*, 308 F.2d 687, 694 (C.A. 9, 1962). Accord: *N.L.R.B. v. Kellogg's, Inc.*, 347 F.2d 219 (C.A. 9, 1965); *N.L.R.B. v. H & H Plastics*, 389 F.2d 678 (C.A. 6, 1968).

refused to recognize the Union.[46] Moreover, the Board justifiably discounted Company President Beaver's testimony that employee Paden telephoned him on September 18 and said that he had been told he would be out of a job when the Union came in if he failed to sign an authorization card (A. 1056; 673), in view of Paden's testimony that he did not call Beaver until after the strike had begun, and then only concerning alleged union pressure to cause him to honor the picket line (A. 1056-1057; 313-314, 321-322).[47] The Board was also warranted in refusing to give probative weight to Beaver's further testimony about employee McConnaughy's alleged statement to him that McConnaughy "was being harassed to sign an authorization card and that he didn't want anything to do with it," and about another employee's alleged statement to employee Bobb that if he did not sign a card he would be out of a job when the Union came in (A. 668-669, 671-672). As the Board pointed out, Beaver testified that these conversations occurred on September 17, before the Union representative met with the employees and gave them union cards to distribute (A. 1055, n. 6; 160, 21-22, 43-44, 668-669). For similar reasons, the Board reason-

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[46] *I.e.*, testimony of employees Banks Fultz, Nellie Fultz, Gary Marsh, and George Winegardner, to the effect that they had been told that if they failed to sign cards when the Union came in they would lose their jobs (A. 345, 453-454, 477-478, 680-681). Of these employees, only Marsh signed a card, and he denied having done so (*supra*, p. 29, n. 30(11)).

[47] Little significance attaches to Company Vice-President Dilliplane's testimony that at an undisclosed hour on September 21 (the date of the second refusal to bargain and the strike) employee Paden asked him whether he would lose his job if the Union came in and he refused to sign a card (A. 451). Dilliplane's testimony fails to show that this conversation occurred prior to the refusal to bargain even on that day, and Paden's remarks as Dilliplane related them fail to indicate the source of Paden's alleged apprehensions. Similar comments are applicable to Dilliplane's testimony regarding an alleged similar conversation, on an unspecified date, with employee Ferrell, whom Dilliplane admittedly reassured (A. 453).

ably discounted Dilliplane's testimony about inquiries allegedly made to him by employee Gary Rhodes, in view of Rhodes' testimony that the events which supposedly underlay such inquiries occurred about September 14 (A. 338-339).

Likewise insubstantial is Beaver's testimony that on September 21 he was advised that two nonunit employees—Earnest and Weaver—had been told that if they did not sign union cards they would lose their jobs (A. 675-676, 680).[48] Beaver must have had some reservations about Earnest's further representation to him that this statement had led him to sign a union card, because on the preceding two days, Beaver had coercively interrogated him about whether he had heard about the Union and signed a union card and, when Earnest finally admitted to having signed a card, urged him to "think it over" (*supra*, pp. 12, 21). In any event, particularly because both these employees were transport drivers who were excluded from the unit requested by the Union (*infra*, p. 50), it "* * * cannot * * * [be said] that the Board was incorrect in refusing to find good faith based upon the express thought of only two employees * * *." See *N.L.R.B. v. H & H Plastics Mfg. Co.*, *supra*, 389 F.2d at 683.

Thus, despite the Company's *post hoc* attempts to establish a basis for a good faith doubt, a fair appraisal of the evidence in the whole record shows that "[a]t the time [the Company's officials] were refusing to recognize they were not aware of any employee dissatisfaction with the way the signatures were obtained." *Snow v. N.L.R.B.*, *supra*, 308 F.2d at 694. Moreover, as the Board noted, "we can only conclude that the [Company's] defense on the basis of knowledge of such alleged employee

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[48] It is unclear whether Beaver's report about Weaver was received before the second refusal to bargain.

coercion was but an afterthought since [the Company] failed to give such coercion as a reason for not recognizing the Union at the time of the Union's requests and [the Company] had made clear its intention of not recognizing the Union under any circumstances" (A. 1057). Added to this and totally refuting the claim of good faith is, of course, the Company's unlawful coercive conduct directed against its employees' union activities which involved virtually its entire managerial complement, including Beaver, and several supervisors. See cases cited *supra*, p. 39. Thus, "[t]he Board not only had the explicit testimony of * * * [Beaver], but could reasonably infer from the events which followed * * * that the [Company] was aware of the true situation and determined [as it had done in the past] to eject the Union from the plant." *Bilton Insulation, Inc. v. N.L.R.B.*, 297 F.2d 141, 144 (C.A. 4, 1961). See also, *D. H. Holmes Co., Ltd. v. N.L.R.B.*, 179 F.2d 876, 878 (C.A. 5, 1950).[49]

By the same token, the Company cannot rely *post hoc* on individual acts of strike misconduct committed by a few employees to justify its continued refusal to grant recognition to the bargaining agent freely chosen by the overwhelming majority of the employees in the unit. Thus, while it is well settled that employee strike misconduct is a consideration to be weighed by the Board in determining whether a bargaining order is appropriate, a finding of such misconduct does not automatically preclude a bargaining order. *N.L.R.B. v. Indiana & Michigan Electric Co.*, 318 U.S.

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[49]Assuming that the Trial Examiner's failure to find a lack of good faith is supported by substantial evidence, it is well established that in cases in which conflicting inferences are possible, the Board "is not precluded from reaching a result contrary to that of the Examiner when substantial evidence supports each result." *Oil, Chemical and Atomic Wkrs. Int. U., Local 4-243 v. N.L.R.B.*, 124 U.S. App. D.C. 113, 115-116, 362 F.2d 943, 945-946 (1966); *Oil, Chemical and Atomic Wkrs., Local 3-89 v. N.L.R.B.*, ___ U.S. App. D.C. ___, ___, 405 F.2d 1111, 1116 (1968).

9, 17-19 (1943). On the contrary, the general rule, recognized by this Court, is that employee or union misconduct does not extinguish the bargaining rights of the employees as a group. *Local 833 v. N.L.R.B.*, 112 U.S. App. D.C. 107, 110-111, 300 F.2d 699, 702-704 (1962), cert. denied, 370 U.S. 911; *N.L.R.B. v. Giustina Bros. Lumber Co.*, 253 F.2d 371, 374-375 (C.A. 9, 1958); *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 872-873 (C.A. 2, 1968), cert. denied, 304 U.S. 576. Of course, in exceptional situations, the Board may refuse to order bargaining where the Union by its officers is guilty of encouraging or engaging in serious acts of strike misconduct. Thus, in *Laura Modes Co.*, 144 NLRB 1592, 1595-1596 (1963), the Board held as follows:

> But our finding that the Respondents acted unlawfully prior to the Union's misconduct is not to be taken as condonation of the Union's subsequent resort to or sanction of violent acts in furtherance of its demand that the Respondents immediately recognize and bargain with it. An atmosphere of violence and intimidation can hardly be expected to produce Respondents' participation in resumed discussion with union agents about the subjects of collective bargaining. * * * [T]he Union's misconduct did not extinguish the employees' right to bargain through the Union. * * *
>
> We do not, however, deem it appropriate to give the Charging Union the benefit of our normal affirmative bargaining order in the circumstances of the case. For we cannot, in good conscience, disregard the fact that, immediately before and immediately after it filed the instant charges, the Union evidenced a total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act in that it resorted to and/or encouraged the use of violent tactics to compel their grant.

Similarly, in *Artcraft and Fireplace Co.*, 174 NLRB No. 110 (1969), the Board refused to issue a bargaining order because the union had "knowledge of what was happening * * * but did not take steps to stop it" and

"the Union representative encouraged some of the acts, * * * engaged in a consistent pattern of" misconduct and was present during many of the incidents of misconduct (op. slip TXD pp. 11-12). See also, *N.L.R.B. v. United Mineral & Chemical Corporation*, 391 F.2d 829, 838-841 (C.A. 2, 1968), where the Court (after finding that the employer's refusal to bargain was not unlawful because motivated by a good faith doubt of majority) stated that a bargaining order would be inappropriate in any event because the union, which had a one-card majority, had sought to increase this margin or enforce its bargaining claim by mass, unprovoked physical attacks on company personnel which were "carried to the point of grabbing a female employee, knocking a male employee to the ground, and making repeated attacks on the owner which incapacitated him for five and a half months—all with the active participation of the Union's international representative."

As the Board found, in the case at bar, "there is not a scintilla of evidence that the Union officials Pointak or Bacon were aware of or encouraged any of the coercive tactics * * *" (A. 1054). Indeed, the type of misconduct found (detailed *infra*, pp. 53-57 and in the Trial Examiner's decision at A. 1031-1036), indicates that the misconduct—although in some cases quite serious—was of an unplanned or spontaneous nature. Moreover, it is also clear that the Union was strongly interested in using and did in fact invoke the orderly processes of the Act to preserve its rights. At worst, this is a typical case of the exuberance of a few employees causing several isolated incidents of misconduct which are neither sanctioned, encouraged nor known about by the Union or the vast majority of peaceful strikers.

It is clear that in such cases where "both labor and management are at fault" the Board balances the policies of "protect[ing] the right of em-

ployees to organize and bargain collectively and * * * [of assuring] that labor organizations respect employers' rights and do not jeopardize the public safety." *Local 833 v. N.L.R.B., supra,* 112 U.S. App. D.C. at 110 and n. 3, 300 F.2d at 703 and n. 3. In doing this, the Board has struck the balance by refusing to order the reinstatement of the striking employees who engaged in the misconduct. This vindicates the interests of the employer and the public without unnecessarily punishing the non-offending employees and Union. This policy resolution is in harmony with this Court's recognition that the picket line violence of some employees cannot be imputed to others not present or present and not participating. *ILGWU v. N.L.R.B.,* 99 U.S. App. D.C. 64, 237 F.2d 545 (1956), relied on in *Local 833 v. N.L.R.B., supra,* 112 U.S. App. D.C., at 111 n. 16, 300 F.2d at 703 n. 16. Indeed, to refuse to order bargaining in such a case would give the employer who has unlawfully refused to bargain before the strike misconduct was even committed, an undeserved boon at the expense of the peaceful strikers.

Admittedly the lines in these cases are not easily drawn. However, as this Court recognizes, "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task" and "those considerations apply with equal vigor to our case where * * * both sides are at fault." *Local 833 v. N.L.R.B., supra,* 112 U.S. App. D.C. at 111 n. 19, 300 F.2d at 704 n. 19, citing *Local 761 Int'l Union of Electrical, Radio and Machine Wkrs. v. N.L.R.B.,* 366 U.S. 667, 674 (1961). We submit that the balance struck by the Board is essentially a matter of fitting remedy to policy peculiarly within the Board administrative competence and is

clearly a reasonable effectuation of the policies of the Act. *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941) and cases cited *infra*, pp. 51-52.[50]

Nor is there merit to the Company's contention before the Board that the Union's bargaining demand encompassed drivers as well as production and maintenance employees, or that the Company thought it did. The Union's bargaining demands made it quite clear that it was requesting recognition of a unit limited to production and maintenance employees (A. 1014; 27, 44, 786). While some drivers attended union meetings and sought to be active in the Union, and some drivers were solicited by their fellow employees to join, neither of these circumstances establishes that the Union was seeking to represent any drivers, or that the Company thought it did in the fact of the Union's specific representations otherwise. Such "spillover" conduct by rank-and-file employees is wholly normal during an organizational drive, and does not establish a desire by the union to represent nonunit employees, particularly where, as here, the union officials had not previously visited the plant and were unfamiliar with the identity and jobs of the employees who attended the first two organizational meetings (A. 1014; 22, 43, 47).[51] Indeed, if there had been

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[50] The strike misconduct discussed *supra*, pp. 46-50, was the Company's sole basis before the Board for arguing that a finding of unlawful refusal to bargain would not warrant a bargaining order. In *Amalgamated Clothing Workers of America v. N.L.R.B. (Henry I. Siegel Co.)*, ___ U.S. App. D.C. ___, ___, ___ F.2d ___, 70 LRRM 2207, 2210-2211, 59 L.C. para. 13185 (Nos. 21086, 21131, 21316, January 9, 1969), a divided panel of this Court remanded to the Board a case in which the Board had issued a bargaining order where, as here, the union's majority had been established through authorization cards. On February 18, 1969, this Court vacated that opinion and granted the Board's petition for rehearing *en banc* of the remand order in *Siegel*.

[51] See, *Houston Insulation Contractors v. N.L.R.B.*, 386 U.S. 664, 668-669 (1967); *Signal Oil & Gas Co. v. N.L.R.B.*, 390 F.2d 338, 340, 342-343 (C.A. 9, 1968); see also, *Truck Drivers Union Local No. 413 v. N.L.R.B.*, 118 U.S. App. D.C. 149, 152-153, 334 F.2d 539, 542-543 (1964), cert. denied, 379 U.S. 916.

some latent confusion concerning the unit sought, the Company was in the best position to know of it and should have appraised the Union of the problem.[52] Instead, the Company chose steadfastly to refuse to even speak to the Union officials, thus indicating that no *bona fide* unit problem was troubling management.

In any event, the Company's unit argument cannot excuse its refusal to bargain, since even an honest (which did not exist here) but mistaken doubt as to the appropriateness of the unit requested does not excuse a refusal to bargain. *Florence Printing Co. v. N.L.R.B.*, 333 F.2d 289, 291 (C.A. 4, 1964); *United Aircraft Corp. (Hamilton Standard Division) v. N.L.R.B.*, 333 F.2d 819, 822 (C.A. 2, 1964), cert. denied, 380 U.S. 910; *N.L.R.B. v. Keystone Floors, Inc.*, 306 F.2d 560, 563-564 (C.A. 3, 1962). The Company's proper course of action was not to refuse to bargain altogether but to meet with the Union in an effort to clarify any possible confusion about the unit sought. See *Sakrete of Northern California, Inc., supra*, 332 F.2d at 908.

III. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S CONCLUSIONS WITH RESPECT TO THE STRIKERS DISCHARGED FOR ALLEGED STRIKE MISCONDUCT

A. The Controlling Principles

Where, as here, an employer discharges unfair labor practice strikers for alleged acts of strike misconduct, "The Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employee's misconduct in determining whether reinstatement would effectuate the policies of the Act." *Local 833 v. N.L.R.B.*, 112 U.S. App. D.C.

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[52] See, *N.L.R.B. v. Fosdal*, 367 F.2d 784, 787-788 (C.A. 7, 1956); *Brewery & Beverage Drivers, Local 67 v. N.L.R.B.*, 103 U.S. App. D.C. 190, 192, 257 F.2d 194, 196 (1958); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 908 (C.A. 9, 1964), cert. denied, 379 U.S. 961.

107, 110-112, 300 F.2d 699, 702-704 (1962), cert. denied, 370 U.S. 911; *N.L.R.B. v. Thayer Co.*, 213 F.2d 748, 753-756 (C.A. 1, 1954), cert. denied, 348 U.S. 883; *Golay & Co. v. N.L.R.B.*, 371 F.2d 259, 262-263 (C.A. 7, 1966), cert. denied, 387 U.S. 944; *Oneita Knitting Mills v. N.L.R.B.*, 375 F.2d 385, 389-390 (C.A. 4, 1967); *N.L.R.B. v. Wichita Television Corp.*, 277 F.2d 579, 584-585 (C.A. 10, 1960), cert. denied, 364 U.S. 871; *N.L.R.B. v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941, 947-948 (C.A. 1, 1961); *Elmira Machine and Specialty Works, Inc.*, 148 NLRB 1695, 1699 (1964).[53] In striking this balance, the Board's determination unless illogical or arbitrary is entitled to affirmance.[54] In the instant case the Board held that "even though finding an unfair labor practice strike, that the [Company] was warranted in discharging and refusing to reinstate four strikers [Beatty, Hoar, Goss, and Coudriet] because of their strike misconduct * * *" (A. 1060, n. 13). The Board

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[53]Whether the strikers are entitled to reinstatement under the foregoing principles may in some cases present issues wholly distinct from the question whether their discharge violated the Act. *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745, International Brotherhood of Teamsters v. N.L.R.B.*, 128 U.S. App. D.C. 383, 384-385, 389 F.2d 553, 554-555 (1968). However, strike conduct sufficient to warrant the Board in denying a remedial reinstatement order (as here) also may constitute a lawful reason for an employer's refusal to reinstate. Moreover, there can be no question that a remedial reinstatement order is appropriate for employees whose discharge for alleged strike misconduct violated the Act. Accordingly, the misconduct issue herein as to the discharged strikers is treated entirely in the terms set forth in the text.

[54]In addition to the cases cited on pp. 51-52, *supra*, see *Kohler v. N.L.R.B.*, 120 U.S. App. D.C. 259, 345 F.2d 748 (1965), cert. denied, 382 U.S. 836; *N.L.R.B. v. American Mfg. Co.*, 106 F.2d 61, 67-68 (C.A. 2, 1939), aff'd as modified on other grounds, 309 U.S. 629; *Olin Industries v. N.L.R.B.*, 191 F.2d 613, 615-616 (C.A. 5, 1951), cert. denied, 343 U.S. 919; *N.L.R.B. v. Stackpole Carbon Corp.*, 105 F.2d 167, 176 (C.A. 3, 1939), cert. denied, 308 U.S. 605; *N.L.R.B. v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 887-888 (C.A. 1, 1941), cert. denied, 313 U.S. 595; *N.L.R.B. v. Mitchko, Inc.*, 284 F.2d 573, 577 (C.A. 3, 1960).

further found, however, that the remaining three discharged strikers (Floyd Leister, Kelley, and Burge) did not engage in such misconduct as to warrant their discharge (A. 1034). We show below that the Board's application of the foregoing principles to the reinstatement rights of the discharged strikers was a reasonable and proper effectuation of the purposes of the Act.

B. The discharged strikers' conduct[55]

John Beatty told employee Marvin Holdridge that Holdridge's life was in danger (A. 1031; 509). Two days later he threw a rock breaking the window of a truck next to Holdridge's face, as the employee was driving a truck into the Company parking lot (A. 1031; 509). A few days later, Beatty used a rock to scratch the paint off the car of a non-striking employee as she drove into the Company's parking lot (A. 1031; 363-364, 702). Beatty was also found to have thrown rocks at Company trucks on two more occasions, one time smashing the outside mirror on the driver's side. On another occasion, Beatty threw a rock that broke the right front window of another car carrying non-strikers (A. 1031; 325, 333, 335, 438). He was twice observed removing the supports of a conveyor unloading flour into the bakery thereby twice interrupting operations until repairs could be made and finally necessitating the posting of a guard

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[55]The strikers' reinstatement rights depend, of course, on their actual conduct, not on what the Company may have thought they did. *N.L.R.B. v. Burnup & Sims*, 379 U.S. 21 (1964); *Dallas General Drivers, supra.* Accordingly, the conduct described in the text is the conduct which the Examiner and the Board found they committed. To the extent that the testimony as to their conduct is in conflict, the Examiner's credibility resolutions are entitled to stand. See, e.g., *Joy Silk Mills v. N.L.R.B., supra*, 87 U.S. App. D.C. at 369, 185 F.2d at 741; *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965); *N.L.R.B. v. Plant City Steel Corp.*, 331 F.2d 511, 513 (C.A. 5, 1964).

(A. 1032; 701-702). Finally, the credited evidence shows that Beatty used a screwdriver to remove a chrome strip from a non-striking employee's automobile and warrants a reasonable suspicion that Beatty was at least implicated in the driving of nails into the tires of the car belonging to the Company's production manager (A. 1032; 470-471, 703, 780-781).

Charles Hoar was involved in throwing rocks through several Company windows and threw a rock that hit the leg of the Company's vice president, who thereafter spent five days in the hospital as a precautionary measure because of a pre-existing heart condition (A. 1032; 449-450).[56] Hoar admittedly met one of the Company's trucks at a supply point and intimidated the Company driver so that he was not able to pick up cakes that were supposed to be transferred from another truck (A. 1032-1033; 412-413, 747, 756). Hoar also admitted that he pulled the cab release on a Company truck, causing the entire cab to tilt forward with the non-striking employee still inside. Hoar then reached his hand into the exposed engine toward the distributor, stopping only after being challenged by another, non-striking employee (A. 1033; 395-397, 403, 498-500, 745-746).

Gerald Goss was one of a group of employees who accosted another Company truck attempting to make a delivery and intimidated the employees on it so they could not unload. As the truck pulled away Goss threw a rock at the truck, striking it in the rear. He admitted destroying property by pushing unloaded goods over a bank in the customer parking lot. Goss further admitted throwing nails on the bakery's parking lot during the strike. Finally, the uncontradicted testimony establishes that he

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[56]The bruise remained on his leg for about four weeks (A. 1032; 450).

threw several rocks at a Swift & Company truck while it was being unloaded (A. 1033; 422-424, 430-432, 469-470, 732-735).

Allen Coudriet threw stones at two trucks pulling away from the Bakery and challenged the drivers to fight. In one of these incidents Coudriet broke the windshield and left side windows of the truck (A. 1034; 424-426, 432-433, 496-498, 500).

Of course, "minor acts of violence do not deprive strikers of the right of reinstatement." *N.L.R.B. v. Wallick*, 198 F.2d 477, 485 (C.A. 3, 1952). Accord: *N.L.R.B. v. Morrison Cafeteria Co.*, 311 F.2d 534, 538 (C.A. 8, 1963); *N.L.R.B. v. Buitoni Foods Corp.*, 298 F.2d 169, 175 (C.A. 3, 1962). However, "[t]hese incidents were not the urge of a moment of animal exuberance. They took place over a period of * * * [several] days." *N.L.R.B. v. Trumbull Asphalt Co. of Del.*, 327 F.2d 841, 846 (C.A. 8, 1964); compare the cases cited on p. 56, *infra*.[57] Under these circumstances, the Board reasonably found that the reinstatement of these discharged strikers, whose serious and dangerous acts of violence occurred during a strike which protested a peaceable employer's denial of initial recognition to a newly chosen union, would not effectuate the statutory purpose of industrial peace. See *Trumbull, supra; N.L.R.B. v. Kelco Corp.*, 178 F.2d 578, 580-581 (C.A. 4, 1949); *N.L.R.B. v. Longview Furniture Co.*, 206 F.2d 274, 276 (C.A. 4, 1953). See also *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257-258 (1939); *Kohler Co.*, 148 NLRB 1434, 1436-1444, 1449-1452 (1964), enforced, 120 U.S. App. D.C. 259, 345 F.2d 748 (1965), cert. denied, 382 U.S. 836.

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[57] Cf. *N.L.R.B. v. M & B Headwear Co.*, 349 F.2d 170, 172-174 (C.A. 4, 1965); *Revere Copper and Brass, Inc. v. N.L.R.B.*, 324 F.2d 132, 134-136 (C.A. 7, 1963); where (unlike here) the employee engaged in misconduct into which he had been directly and personally provoked by the employer.

We submit that the Board's finding that the Company violated Section 8(a)(3) and (1) by discharging and refusing to reinstate three more strikers was likewise proper. The only credited evidence as to employee *Kelley's* misconduct indicates that he was one of 12 or 15 strikers present when employee Hoar unsuccessfully attempted to scare a Company driver into not making a pickup (A. 1033, 1035; 747-748, 756). There is no evidence linking Kelley to any actual misconduct on his part during this incident (A. 1035; 411-413, 423-424, 729-730). The only evidence of strike misconduct by *Burge* is that one night he threw stones at three trucks leaving the Company's bakery, without, however, damaging them (A. 1036; 495, 497-498, 558-564). As to *Floyd (Dick) Leister,* his only pre-discharge act of strike misconduct was throwing a small stone that landed on the roof of a car carrying two non-strikers out of the Company's parking lot (A. 1034; 315-316, 365-366, 396, 499-500, 757-758). While Leister was present during two other incidents where other employees misconducted themselves, the credited evidence indicates that he took no part in the misconduct (A. 1031; 363-364, 701-702, 775) and indeed on one occasion helped to prevent a fight between a striker and a non-striker (A. 1033; 574-577, 745-746, 758).

The Board reasonably found that the company could not lawfully discharge these employees for such strike activity. See the cases cited on p. 55, *supra;* see also, *Milk Wagon Drivers Union of Chicago Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941); *N.L.R.B. v. Thor Power Tool Co.*, 351 F.2d 584, 587 (C.A. 7, 1965); *N.L.R.B. v. Illinois Tool Works,* 153 F.2d 811, 815-816 (C.A. 7, 1946). In any event, as unfair labor practice strikers they were entitled to reinstatement under the principles set forth on pp. 51-52, *supra.* For similar reasons, Floyd

Leister's participation in a picket line scuffle after his discriminatory discharge did not deprive him of reinstatement rights, particularly because the scuffle was provoked when a Company truck struck Leister from the rear while he was peacefully picketing (A. 1034-1035; 409, 414-417, 712-713, 737-741, 759-760, 776-777).

IV. THE BOARD PROPERLY FOUND THAT THE COMPANY DID NOT VIOLATE SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO REINSTATE UNFAIR LABOR PRACTICE STRIKERS WHO CONDITIONED THEIR OFFER TO RETURN TO WORK ON REINSTATEMENT OF ALL THE EMPLOYEES ON STRIKE, INCLUDING THE FOUR EMPLOYEES THAT THE BOARD FOUND WERE PROPERLY DISCHARGED FOR STRIKE MISCONDUCT

A strike caused by an employer's unlawful refusal to meet and negotiate with its employees' collective bargaining representative is clearly an unfair labor practice strike. See, *e.g.*, *General Drivers and Helpers Union, Local 662 v. N.L.R.B.*, 112 U.S. App. D.C. 323, 325-326, 302 F.2d 908, 910-911 (1962), cert. denied, 371 U.S. 827. Clearly, an employer also violates the Act by refusing to reinstate unfair labor practice strikers to their former or equivalent positions upon their unconditional demand, even if he must discharge replacements to do so. *Mastro Plastics v. N.L.R.B.*, 350 U.S. 270, 278 (1956). Accord: *General Drivers & Helpers Union, Local 662 (Rice Lake Creamery Co.) v. N.L.R.B.*, 112 U.S. App. D.C. 323, 326, 302 F.2d 908, 911 (1962), cert. denied, 371 U.S. 827; *N.L.R.B. v. Stilley Plywood Co., Inc.*, 199 F.2d 319, 321 (C.A. 4, 1952), cert. denied, 344 U.S. 933; *N.L.R.B. v. Poultrymen's Service Corp.*, 138 F.2d 204, 310 (C.A. 3, 1943); *Rapid Roller Co. v. N.L.R.B.*, 126 F.2d 452, 460 (C.A. 7, 1942), cert. denied, 317 U.S. 650.

The Board has consistently held from the earliest days of the Act, both that the duty to reinstate does not arise unless an unconditional

application is made and that an application conditioned upon the employer's doing something that he had no legal duty to do or conditioned on the removal of an unfair labor practice is conditional. Thus, in *Fansteel Metallurgical Corporation*, 5 NLRB 930 (1938), enf. denied on other grounds, 98 F.2d 375 (C.A. 7, 1938), Court of Appeals decision modified on other grounds, 306 U.S. 240 (1939), the Board made clear its conclusion that an employer's refusal to remedy an earlier unfair labor practice as the price for termination of the strike by the employees does not constitute a separate violation of the Act:

> It might be argued that since the Union was demanding as a condition to reinstatement only something to which they were entitled under the Act—recognition and collective bargaining—the Respondent in illegally refusing this demand should be considered as discriminatorily refusing to reinstate the strikers.
>
> We do not take this view. So long as the employees were unwilling to return to work under the conditions existing at the time the strike was called, however just the grounds on which their position was based, it cannot be said that the respondent was refusing to reinstate them. 5 NLRB at 945.

As explained in later cases, the basis for this conclusion is that 66 employees who could have returned to work and sought an adjudication of their rights through the medium of the Act but who elected to remain away from work . . . in protest against the respondent's refusal of exclusive recognition" (*Harter Corporation*, 8 NLRB 391, 411 (1938)), are in effect using the strike rather than the Act as a means of seeking redress of the unfair labor practices, and therefore will continue to be treated as strikers rather than be afforded the status of discriminatees. Indeed, the Courts and the Board have come to treat as axiomatic the principle that a request for reinstatement demanding that the employer remedy the unfair labor

practice which the strike protests is conditional and does not require the employer to reinstate. See, *N.L.R.B. v. Kohler Co.*, 122 U.S. App. D.C. 101, 107, 111, 351 F.2d 798, 804, 808 (1965); *N.L.R.B. v. Beverage-Air Co.*, 402 F.2d 411, 415-416 (C.A. 4, 1968); *N.L.R.B. v. Fotochrome, Inc.*, 343 F.2d 631, 633 (C.A. 2, 1965), cert. denied, 382 U.S. 833; *Philip Carey Mfg. Co. v. N.L.R.B.*, 331 F.2d 720, 729 (C.A. 6, 1964), cert. denied, 379 U.S. 888. See, also, *Texas Foundries, Inc.*, 101 NLRB 1642, 1680 (1952), set aside on other grounds, 211 F.2d 791 (C.A. 5, 1954); *Allegheny Pepsi-Cola Bottling Co.*, 134 NLRB 388, 404 (1961), enforced, 312 F.2d 529 (C.A. 3, 1962); *Northern Virginia Sun Publishing Co.*, 134 NLRB 1007, 1009 (1961);[58] *Hock & Mandel Jewelers*, 145 NLRB 435 (1963); *Western Equipment Co.*, 149 NLRB 248, 258 (1964), enforced, 357 F.2d 661 (C.A. 9, 1966); *Comfort, Inc.*, 152 NLRB 1074, 1078, 1090 (1965), enforced as modified, 365 F.2d 867, 877-878 (C.A. 8, 1966); *Flambeau Plastics Corp.*, 172 NLRB No. 33 (1967), pending on petition to review in the Seventh Circuit, No. 17104.[58a]

As the cases cited above demonstrate, the Board's view that an employer does not violate the Act by rejecting strikers' reinstatement applications which are conditioned on his remedying his unfair labor practices, rests on the basic statutory policy to encourage the correction of unfair labor practices through the peaceful procedures of the Act rather than by strikes. In the Board's view, therefore, to hold an employer answerable for back pay while his employees are striking and continuing

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[58] Remanded on other grounds, 114 U.S. App. D.C. 255, 314 F.2d 260 (1963); mandamus issued in connection with remand, 117 U.S. App. D.C. 357, 330 F.2d 231 (1964); decision on remand, based on other grounds, 159 NLRB 1634 (1966); affirmed, 127 U.S. App. D.C. 223, 382 F.2d 172 (1967).

[58a] Affirmed, after this brief was filed in typewritten form, *sub nom. Local 380, International Union, Allied Industrial Workers v. N.L.R.B.*, June 9, 1969.

to strike against the underlying unfair labor practices is to make him responsible for the costs of the strike itself as well as for his own unfair practices. It would be, in effect, to require the employer to "subsidize" the strike, thereby encouraging employees to use the strike weapon in the hope that the employer might have to make up their loss.

On the other hand, the employer's duty to reinstate employees who have unconditionally applied obviously does not permit him to use the occasion of such application to impose *new* unlawful conditions on them. Where an employer does so, the Board will find a violation of Section 8(a)(3) and (1). See, e.g., *N.L.R.B. v. Poultrymen's Service Corp.*, 138 F.2d 204, 210 (C.A. 3, 1943); *Lion Oil Co. v. N.L.R.B.*, 245 F.2d 376 (C.A. 8, 1957), enf'g 109 NLRB 680, 687 (1954); *N.L.R.B. v. E.A. Laboratories*, 188 F.2d 885, 886-887 (C.A. 2, 1951), cert. denied, 342 U.S. 871; *John Hansen Materials & House Moving, Inc.*, 161 NLRB 801, 804-805 (1966); *Goodyear Aircraft Corp.*, 63 NLRB 1340, 1353 (1945). In essence, the Board feels that where employees have already decided to end a strike even in the face of continuing unfair labor practices, employers should be deterred from imposing fresh illegal conditions which might prolong the strike.

In applying these principles, the Board decides, in the circumstances of each case, whether the employer's refusal to reinstate is due to the attempt of the employees to require concessions or due to the employer's own attempt at effecting further discrimination beyond the underlying unfair practices which caused the strike. See, e.g., *N.L.R.B. v. Comfort, Inc.*, 365 F.2d 867, 877-878 (C.A. 8, 1966), enf'g in this respect 152 NLRB 1074 (1965), where the employer was found to violate Section 8(a)(3) because its response to the strikers' applications made it clear that its refusal to reinstate was predicated on its own discriminatory position,

not on the employees' conditional application. See, also, *Serv-Air. Inc. v. N.L.R.B.*, 395 F.2d 557, 561-562 (C.A. 10, 1968), cert. denied, 393 U.S. 840; *Kitty Clover, Inc.*, 103 NLRB 1665, 1667 (1953), enforced, 208 F.2d 212 (C.A. 8, 1953); *N.L.R.B. v. E.A. Laboratories, Inc.*, 188 F.2d 885, 886-887 (C.A. 2, 1951), cert. denied, 342 U.S. 871.

Similarly, an employer, after receiving an unconditional request for reinstatement, cannot offer reinstatement to a "selected group of striking employees while unlawfully denying employment to other members of the same group because of their concerted activities in which all the employees participated together." *Draper Corp.*, 52 NLRB 1477, 1479 (1943), set aside on other grounds, 145 F.2d 199 (C.A. 4, 1944).[59] In essence, in the short-hand term commonly used, the Board seeks to determine whether the offer to reinstate or the application for reinstatement was "conditional" or "unconditional."

From the foregoing discussion it becomes apparent that a request for reinstatement conditioned on the employer's doing something he had no

[59] The rationale for this rule was succinctly stated in the above case by the Board:

> Thus, the Act recognizes the fundamental necessity of assuring to employees the group security derived from their association in labor organizations with their fellow employees. To permit the respondent to single out a selected number of a group of employees for reinstatement and unlawfully to deny reinstatement to others in the same group acting in concert with them, is discrimination in its purest form against the entire group, for it denies to each member of the group the very protection at a time they require it most, namely at the abandonment of what is to them an unsuccessful strike (*ibid.*).
>
> * * *
>
> To hold otherwise would permit an employee to pit certain members of a group against other members of the same group by forcing the former to act as strikebreakers, under penalty of loss of wages, and thereby cause them to become a party to the employer's unfair labor practices against the latter in a situation where the basis of the decision is the collective concerted activity of the entire group. *Id.*, at 1480.

legal duty to do is "conditional." See *American Optical Co.*, 138 NLRB 681, 682 (1962). And see *Northern Virginia Sun Publishing Co., supra*, 134 NLRB at 1009. Thus, as in the instant case, where the Board finds that an employer was justified in refusing reinstatement to certain strikers, a request for reinstatement unless "clearly independent of reinstatement for [the properly discharged strikers]" is conditional. *National Automotive Products Co.*, 128 NLRB 672 (1960). Accord: *Celotex Corp.*, 146 NLRB 48, 49 (1964), enforced 364 F.2d 552 (C.A. 5, 1966), cert. denied, 385 U.S. 987. Cf. *Rice Lake Creamery Co.*, 131 NLRB 1270, 1286, enforced, 112 U.S. App. D.C. 323, 302 F.2d 908 (1962), cert. denied, 371 U.S. 827.

As detailed in the statement (*supra*, pp. 17-18), the Union requested reinstatement for all the strikers on October 20, 1965. The Company by reply telegram agreed to reinstate all striking employees except the seven employees discharged because of alleged strike misconduct. The Union by reply telegram rejected the counter-offer, stating that its "offer was contingent on full employment and restoration of jobs to all employees presently protesting the unfair labor practice" and that it could not accept the Company's unilateral determination concerning strike misconduct. Meanwhile the Company had sent letters, dated October 22, to the seven employees indicating that they were discharged for strike misconduct (*supra*, p. 18). On December 28, the Union sent another telegram requesting reinstatement of "all employees now on strike" and unconditionally offering to return to work. The Company promptly reinstated all the strikers except the seven who had been discharged.

As shown above, four of the striking employees were properly discharged for strike misconduct. Until the strikers actually returned to work, it is clear that the Union's requests for reinstatement were condi-

tioned on the Company's rehiring all the strikers, including the four found to have been properly discharged. Such requests were clearly conditional and therefore the refusal to reinstate the strikers was not violative of Section 8(a)(3) and (1) of the Act. See cases cited *supra*, pp. 57-59 and 62. That the Company's refusal to reinstate the employees when requested was based not on its own discriminatory position but rather on the condition imposed by the Union is shown by the fact that the Company took back all the strikers who were willing to return to work without the seven employees discharged for strike violence (*supra*, p. 18).

CONCLUSION

For the reasons stated above, we respectfully submit that a decree should issue denying the Union's petition for review in No. 21,966, and granting enforcement of the Board's Order in No. 22,089.

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March 1969.

Nos. 21,966 & 22,089

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO.,

Intervenor.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO.,

Respondent.

On Petition to Review and On Petition for Enforcement of an Order of The National Labor Relations Board

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SUPPLEMENTAL BRIEF AND APPENDIX FOR THE NATIONAL LABOR RELATIONS BOARD FOLLOWING PROCEEDINGS PURSUANT TO REMAND

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* Authorities chiefly relied upon.

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SUPPLEMENTAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD FOLLOWING PROCEEDINGS PURSUANT TO REMAND

ISSUES PRESENTED FOR REVIEW

The issue presented for review which is treated in this brief is as follows:

Whether the Board was warranted in reaffirming its issuance of a bargaining order herein in light of the Supreme Court's decision in *N.L.R.B. v. Gissel Packing Company, Inc.*, 395 U.S. 575 (1969).

The parties' views as to the remaining issues presented for review in this proceeding are set forth on pp. 1-6 of our main brief herein, filed with the Court in May 1969. The Board is of the opinion, however, that its then proposed issue 2(C), appearing on p. 3 of that brief, is no longer of any significance (see p. 3, n. 3, *infra*).

REFERENCES AND RULINGS

The Board's original decision and order (A. 1011-1063)[1] issued on May 23, 1968, and is reported at 171 NLRB No. 98. Its supplemental decision and order (S.A. 1-4, *infra*) issued on May 27, 1970, and is reported at 182 NLRB No. 122.

Pursuant to Rule 8(d) of the Rules of this Court, the Board states that the Board's supplemental decision and order herein issued after a remand by this Court on October 17, 1969. Prior to such remand, briefs of all parties had been filed and the case set for oral argument.[2] The Court retained jurisdiction of the case and directed the Board, upon completion of the remand proceedings, to return the certified index supplemented by the proceedings had on remand.

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[1] "S.A." refers to the Board's supplemental decision, which is printed as an Appendix to this brief. "A." references are to the printed appendix filed prior to remand.

[2] The Board had filed a main brief, a reply brief, and a supplemental reply brief; the Union, a main brief; and the Company, a main brief as respondent in No. 22,089, a supplemental brief as respondent, and a brief purportedly as intervenor in No. 21,966. The case initially was set for argument on June 17, 1969; was reset by the Court *sua sponte* on July 8, 1969; and thereafter was indefinitely postponed by the Court *sua sponte*.

STATEMENT OF THE CASE AS TO PROCEEDINGS FOLLOWING REMAND

The Court remanded the record in this case to the Board on October 17, 1969, upon the Board's motion, for further proceedings in light of the Supreme Court's decision in *N.L.R.B. v. Gissel Packing Company, Inc.*, 395 U.S. 575 (1969). The Board, after reviewing the entire record and considering the statements of position submitted by the parties with respect to the application of *Gissel* to this case, reaffirmed its previous order directing the Company to bargain with the Union upon request (S.A. 4). The Board has now moved the Court for enforcement of its order, as reaffirmed.

This supplemental brief is directed primarily to the propriety of the Board's supplemental decision and order. However, we are also directing the Court's attention to certain decisions issued after the filing of our prior briefs herein which bear upon the arguments there made.

As discussed in our main brief (Br., pp. 18-19, 24-51), the Board found in its initial decision, *inter alia*, that the Union had obtained valid authorization cards from a majority of the employees in the unit found appropriate, that the Company had no basis on which it could assert a good faith doubt of the Union's majority status,[3] and that the Company's refusal to recognize and bargain with the Union therefore violated Section 8(a)(5) and (1) of the Act. The Board issued a bargaining order to remedy the Section 8(a)(5) violation.

After reconsidering the facts, the Board concluded, upon remand, that a bargaining order was called for under the standards set forth in the Supreme Court's opinion in *Gissel*. The Board considered the Company's

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[3] While the briefs previously filed in this proceeding extensively discussed the propriety of this finding, *Gissel* has rendered the issue of good or bad faith doubt virtually irrelevant in cases of this kind. *International Ladies' Garment Workers' Union v. N.L.R.B. (Garland Knitting)*, ___U.S. App. D.C.____, 414 F.2d 1214, 1216 (1969); *Food Store Employees Union, Local 347 v. N.L.R.B. (Heck's)*, ___U.S. App. D.C. ____, 418 F.2d 1177, 1183-1184 (1969).

refusal to bargain in the context of its contemporaneous unfair labor practices, which, as shown in our main brief (Br., pp. 19-24, 51-57), included threats and coercive interrogation by Company officials and supervisors, and the unlawful discharge of three unfair labor practice strikers. "These unfair labor practices," the Board found, "tended to destroy the Union's majority status achieved by authorization cards and to prevent a free election. In our view, it is unlikely that the effect of these unfair labor practices could be neutralized by conventional cease and desist remedies which would ensure a fair election" (S.A. 3). Under the circumstances, the Board concluded that the authorization cards constituted "a more reliable measure of [the employees'] stand on the issue of representation" than would an election, and that a bargaining order therefore would best effectuate the policies of the Act (S.A. 3-4).

ARGUMENT

AN ORDER REQUIRING THE COMPANY TO BARGAIN WITH THE UNION WAS PROPER UNDER THE CIRCUMSTANCES OF THIS CASE

In *Gissel, supra*, 395 U.S. 575, the Supreme Court sustained the Board's remedial authority to issue a bargaining order in cases similar to this one, where unfair labor practices have been committed "that interfere with the election processes and tend to preclude the holding of a fair election." The Court indicated that a bargaining order would be appropriate in two situations: (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that a bargaining order is the only effective means of remedying those unfair labor practices;[4] and (2) where the unfair labor practices, though less substantial, are nonetheless such that "the Board finds that the possibility of erasing the effects of past practices and

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[4] In *Sinclair* (one of the cases decided in *Gissel*), the Supreme Court found that this test was satisfied where the only unfair labor practice was a veiled threat of plant closure by the company president (395 U.S. at 615).

of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order" (*id.*, at 614). Moreover, the Court emphasized, "It is for the Board and not the courts . . . to make [the determination] whether the effects of the employer's unfair labor practices can be erased without issuance of a bargaining order, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." 395 U.S. at 612, n. 32. We submit that under these standards, the Board's reaffirmance of a bargaining order in this case is entitled to acceptance by this Court.

In its statement of position in the remand proceedings, the Company contended that its unfair labor practice conduct was too isolated and insubstantial to interfere with the election process or tend to prevent a free choice by the employees. As support for this contention, the Company relied on the Trial Examiner's decision, which characterized the Company's unfair labor practices as "only a few isolated incidents" (A. 1048). The Board had already rejected this view of the Company's conduct, however. In its initial decision, the Board held that the Section 8(a)(1) violations were, in fact, substantial enough to support an inference that the Company acted in bad faith in refusing to recognize and bargain with the Union. It further concluded that the Company had engaged in this unlawful conduct for the purpose of impeding and coercing its employees in the exercise of their statutory rights (A. 1057-1059).

Thus, as we have heretofore shown, the Union was validly designated as bargaining representative by a substantial majority of the employees in the bargaining unit, and that the Company engaged in a broad-gauged campaign of coercion designed to destroy that majority and thwart unionization (see our main brief, pp. 11-14). The Company's efforts included repeated unlawful threats and coercive interrogation of employees by its

president, its vice president, and its production manager, as well as three supervisors, occurring against the background of management's long-standing, open hostility to unionization. In addition, when the Union struck in protest against the Company's unfair labor practices, the Company unlawfully discharged and refused to reinstate three of the strikers (see our main brief, pp. 51-53, 56-57). On this record, the Board was amply warranted in concluding that a bargaining order was an appropriate remedy. Indeed, since *Gissel*, the courts have repeatedly enforced bargaining orders in cases where employer misconduct has been no more widespread or severe than was the Company's here. See, *e.g.*, *N.L.R.B. v. L. B. Foster*, 418 F.2d 1, 4 (C.A. 9, 1969), cert. denied, 397 U.S. 990; *N.L.R.B. v. Mink-Dayton, Inc.*, ___ F.2d ___, 74 LRRM 2046 (C.A. 6, No. 18,605, April 20, 1970); *N.L.R.B. v. Production Industries, Inc.*, ___ F.2d ___, 74 LRRM 2175 (C.A. 6, 1970); *N.L.R.B. v. Cedar Hills Theatres, Inc.*, 417 F.2d 612, 613 (C.A. 5, 1969); *N.L.R.B. v. Wylie Mfg. Co.*, 417 F.2d 192, 196 (C.A. 10, 1969), cert. denied, 397 U.S. 913; *N.L.R.B. v. S. E. Nichols-Dover*, 73 LRRM 2816 (C.A. 3, 1970); *Snyder Tank Co. v. N.L.R.B.*, 74 LRRM 2626, 2628 (C.A. 2, 1970). See also, *Food Store Employees' Union, Local 347 v. N.L.R.B. (Heck's, Inc.)*, ___ U.S. App. D. C. ___, ___ F.2d ___, 74 LRRM 2109, 2110, n. 3 (C.A.D.C., Nos. 22,318 and 22,414, May 4, 1970).

The other grounds on which the Company opposed the imposition of a bargaining order in the remand proceedings are likewise without merit.

The Company contended that a bargaining order was unnecessary because the passage of time and a suggested turnover of unit personnel had assertedly "erased any effects" of the Company's misconduct from the minds of the remaining employees. But the Supreme Court made clear in *Gissel* that lapse of time and intervening employee turnover do not justify a court of appeals' refusal to enforce a bargaining order remedy in a case such as this one. The Court stated (395 U.S. at 610):

> We have long held that the Board is not limited to a cease-and-desist order in such cases, but has authority to issue a bargaining order without first requiring the union to show that it has been able to maintain majority status. See *N.L.R.B. v. Katz*, 369 U.S. 736, 748, n. 16 (1962); *N.L.R.B. v. P. Lorillard Co.*, 314 U.S. 512 (1942). And we have held that the Board has the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *Franks Brothers Co. v. N.L.R.B.*, 321 U.S. 702 (1944). We see no reason now to withdraw this authority from the Board. . . .

For, the Court added (*id.*, at 610-611):

> If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him "to profit from [his] own wrongful refusal to bargain," *Franks Brothers, supra*, at 704, while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; and any election held under these circumstances would be unlikely to demonstrate the employees' true undistorted desires.

Gissel also rejected the view, which is implied in the Company's position before the Board, that to impose a bargaining order on employees who may not now desire the union, "is an unnecessarily harsh remedy that needlessly prejudices employees' §7 rights" (395 U.S. at 612). The Court stated (*ibid.*):

> Such an argument ignores that a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and de stroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign. . . .[5]

See also, pp. 11-14 of our reply brief, filed in May 1969.[6]

Recently, in *N.L.R.B. v. L. B. Foster Co.*, 418 F.2d 1 (C.A. 9, 1969), cert. denied, 397 U.S. 990, the Ninth Circuit applied the foregoing rationale and sustained a bargaining order remedy where a substantial turnover in unit personnel had occurred between the time of the employer's unlawful conduct and the issuance of the order. The Court stated (418 F.2d at 4):

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[5] The Court added (*id.*, at 613):

> There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. . . .

[6] This brief cited two cases which the Supreme Court remanded after *Gissel*, in both of which the Board reaffirmed its bargaining order and both of which are again pending review. *N.L.R.B. v. Pembeck Oil Co.*, 404 F.2d 105, 112-113 (C.A. 2, 1968), remanded, 395 U.S. 828, decision on remand, 180 NLRB No. 87 (1970), now pending before C.A. 2, No. 34,722; *Thrift Drug Co. v. N.L.R.B.*, 404 F.2d 1097 (C.A. 6, 1968), remanded, 395 U.S. 828, n. 1, decision on remand, 179 NLRB No. 139 (1969), now pending before C.A. 6, No. 20,199.

The bargaining order referred to in n. 50, p. 50 of our main brief was later enforced by this Court. *Amalgamated Clothing Workers of America v. N.L.R.B.*, ___ U.S. App. D. C. ___, 417 F.2d 559 (1969), cert. denied, 396 U.S. 1015.

> The delay is not the fault of the union; if it is anyone's fault, it is that of the employer. But regardless of fault, it is an unfortunate but inevitable result of the process of hearing, decision and review prescribed in the Act. And to deny enforcement, with or without remand for reconsideration on the basis of facts occurring after the Board's decision, is to put a premium on continued litigation by the employer; it can hope that the resulting delay will produce a new set of facts, as to which the Board must then readjudicate. * * * When is the process to stop?

The Court added (*id.*, at 8):

> [T]he rapid turnover in the employer's personnel . . . is a reason to enforce. Otherwise, there will be an added inducement to the employer to indulge in unfair labor practices in order to defeat the union in the election. He will have as an ally, in addition to the attrition of union support inevitably springing from delay in accomplishing results, the fact that turnover will help him. . . . .[7]

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[7] As the Ninth Circuit noted in that case (418 F.2d at 5), "the Union began with 14 of 18 employees and was down to five signers out of nine in the unit when the election was held."

The Fifth Circuit's decision in *N.L.R.B. v. American Cable Systems, Inc.*, ___ F.2d ___ (C.A. 5, No. 25,358, March 30, 1970, 73 LRRM 2913), which holds that the propriety of the bargaining order should be tested as of the time the order is issued, misconceives the rationale of *Gissel* and would render a bargaining order inappropriate in a large majority of the cases where the Supreme Court sanctioned its use. The Fifth Circuit's attempt to distinguish *Foster* on the ground that "although it was decided after *Gissel* it did not involve a remand in light of that case to the Board for additional findings" relies on a circumstance which does not in any way make the considerations outlined above – that is, the reasons for looking, not to the present, but to the circumstances at the time the unfair labor practices were committed – less valid here.

(Cont'd)

The Company also contended in the supplemental proceedings before the Board that a bargaining order is inappropriate in the instant case because the Union allegedly engaged in serious misconduct during its strike against the Company. To impose a bargaining order under the circumstances, the Company argued, would "reward" the Union for its unlawful conduct. However, as we pointed out in our main brief in response to a related Company contention, such strike misconduct as occurred in this case was spontaneous in nature and was not sanctioned or encouraged by the Union. And in such circumstances, the Board and the courts have consistently held that the striking employees' misconduct does not extinguish the bargaining rights of the employees as a group (see our main brief, pp. 46-49; and in our reply brief, pp. 5-6). It must be remembered, moreover, that the strike was precipitated by the Company's unlawful rejection of the Union's request for recognition and its contemporaneous Section 8(a)(1) violations, which the Board found rendered a fair election impossible. Compare *N.L.R.B. v. United Mineral Corp.*, 391 F.2d 829, 841 (C.A. 2, 1968). While the Board does not condone conduct by either party which interferes with employees' freedom of choice, it could properly conclude, in view of this sequence of events, that the ultimate responsibility for any such interference in this case rested with the Company. And since a substantial majority of the employees in the unit had validly designated the Union as their representative prior to the strike, a bargaining order is warranted to protect their organizational interests. Cf. *Pacific Abrasive Supply Co.*, 182 NLRB No. 48 (1970).

(Footnote 7 continued)

The Sixth Circuit's decision in *Clark's Gamble Corp. v. N.L.R.B.*, 407 F.2d 199, 202 (C.A. 6, 1969), remanded, 396 U.S. 23, cited by the Company in its statement of position, turns not simply on the passage of time and employee turnover, but on the court's determination that the Board and its Trial Examiner had been responsible for inordinate delays in adjudicating the case. See the Court's opinion on remand, 422 F.2d 845 (C.A. 6, 1970). The Board has filed a petition for certiorari in that case (No. 265, October 1970 Term).

CONCLUSION

For the reasons stated herein and in our main and reply briefs, we submit that the petition for review should be denied, and that a judgment should issue enforcing the Board's order in full.[8]

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July 1970.

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[8] The Board found in its original decision that the Company did not violate the Act by refusing to reinstate the strikers, on the ground that the Union's original offer on behalf of the strikers to return to work was specifically conditioned upon the reinstatement of all strikers, some of whom the Company was not obligated to reinstate (A. 1060). In No. 21,966, the Union attacks this finding on the ground that all the strikers were entitled to reinstatement (Un. Br., pp. 19-22). In view of the Company's offer to reinstate all but 7 named strikers (A. 1030; 711, 950), we draw the Court's attention to *Southwestern Pipe, Inc.*, 179 NLRB No. 52 (1969), petitions to review now pending (C.A. 5, Nos. 28,676 and 28,810), in which the Board held that an employer's failure to offer group reinstatement to unfair labor practice strikers does not subject him to immediate backpay liability as to those employees who were offered reinstatement but rejected such offer because the employer had not made a similar offer to other strikers who were also entitled to reinstatement. See also, *National Business Forms, Inc. v. N.L.R.B.*, 74 LRRM 2224 (C.A. 6, 1970), remanding 176 NLRB No. 122 (1969) (slip opinion, pp. 26-27, Trial Examiner's decision).

SUPPLEMENTAL APPENDIX

* * *

* * * Burnham, Pa.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BEAVER BROS. BAKING CO., INC.,
d/b/a AMERICAN BEAUTY BAKING CO.

and

AMERICAN BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO

Cases 6-CA-3455
6-CA-3518

and

BLAIR KELLY, An Individual

SUPPLEMENTAL DECISION AND ORDER

On May 23, 1968, the National Labor Relations Board issued its Decision and Order in the above-entitled proceedings,[1] finding that the Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, and ordering the Respondent to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including an order directing Respondent to bargain with the Union.

On June 16, 1969, the Supreme Court of the United States issued its decision in *N.L.R.B. v. Gissel Packing Company*, 395 U.S. 575, affirming generally the Board's use of authorization cards in determining a union's majority status, and the Board's power to issue a bargaining order based upon such showing where the employer's unfair labor practices had a tendency to undermine the Union's majority and impede the election process.

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[1] 171 NLRB No. 98.

Thereafter, the United States Court of Appeals for the District of Columbia remanded the instant proceeding to the Board for reconsideration in the light of the Supreme Court's opinion in *Gissel*. On October 28, 1969, the Board issued a Notice permitting the parties to file statements of position with respect to the application of *Gissel* to this proceeding. Subsequently, the Respondent and the General Counsel filed timely statements in support of their respective positions.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its power in connection with this case to a three-member panel.

We have again reviewed the entire record, including the statements of position, and, having reconsidered the matter, affirm our original finding and order in this respect for the reasons stated below.

In our initial Decision we found, in agreement with the Trial Examiner, that the Respondent violated Section 8(a)(1) of the Act. These unlawful acts are fully detailed in the Trial Examiner's original Decision and summarized in our original Decision. Contrary to the Trial Examiner, however, we found and concluded that Respondent's Section 8(a)(1) violations were not minimal, but were, in fact, substantial enough to support an inference of bad faith on the part of the Respondent in its refusal to recognize the Union as representative of an uncoerced majority of its employees in an appropriate unit, and that Respondent's unlawful conduct had for its

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[2] The Respondent has also filed a Motion to Remand to the Trial Examiner for the Purpose of Reopening the Record to Adduce Additional Evidence, Make New Findings, and Reconsider his Prior Findings. The General Counsel has filed a statement in opposition thereto. We conclude that the issues on the record before us have been fully litigated and further that there is no basis for remanding the case to the Trial Examiner for reconsideration of his prior finding or for the making of new findings. Accordingly, Respondent's motion is denied.

purpose the impeding and coercion of its employees in the exercise of their statutory rights. The Board also found that Respondent discriminatorily discharged three employees in violation of Section 8(a)(3) and (1) of the Act, and, further that the strike that began on September 21, 1965, in protest of Respondent's conduct was, at its inception an unfair labor practice strike.

With respect to the Section 8(a)(5) allegation of the complaint, the Board found that at all times material the Union represented an uncoerced majority in an appropriate unit of Respondent's employees, and was entitled to recognition as their exclusive collective-bargaining representative; and that, in the absence of any convincing evidence that Respondent had any reasonable basis upon which it could validly assert a good-faith doubt of the Union's majority, Respondent's refusal to recognize the Union was in violation of Section 8(a)(5) of the Act. The Board issued a bargaining order.

We are convinced after a careful reexamination of the facts herein in the light of the standards set forth in the Supreme Court's opinion in *Gissel* that a bargaining order is warranted. The Respondent's campaign to defeat the Union's organizational efforts consisted not only of serious acts of interference, restraint, and coercion against its employees in violation of Section 8(a)(1), but included the discriminatory discharge of three employees in violation of Section 8(a)(3). These unfair labor practices tended to destroy the Union's majority status achieved by authorization cards and to prevent a free election. In our view, it is unlikely that the effect of these unfair labor practices could be neutralized by conventional cease and desist remedies which would ensure a fair election. We therefore find that the employees' desires as expressed through the authorization cards are a more reliable measure of their stand on the issue of representation, and that the policies of the Act will be better effectuated by the issuance of a bargaining

order. Therefore, the bargaining order previously issued to remedy the Respondent's unfair labor practices is appropriate to remedy its violations of Section 8(a)(5) and (1), and we shall affirm it.

SUPPLEMENTAL ORDER

In view of the foregoing, and on the basis of the record as a whole, the National Labor Relations Board affirms its Order issued in this proceeding on May 23, 1969.

Dated, Washington, D. C., May 27, 1970.

/s/ John H. Fanning, Member

/s/ Gerald A. Brown, Member

/s/ Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nos. 21,966 & 22,089

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,966

AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO.,

Intervenor.

No. 22,089

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO.,

Respondent.

On Petition to Review and On Petition for Enforcement of An Order of The National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD TO PETITIONER'S BRIEF IN NO. 21,966, AND TO RESPONDENT'S INITIAL ANSWERING BRIEF IN NO. 22,089

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On Petition to Review and On Petition for Enforcement of An Order of The National Labor Relations Board

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD TO PETITIONER'S BRIEF IN NO. 21,966, AND TO RESPONDENT'S INITIAL ANSWERING BRIEF IN NO. 22,089

The Company has assumed the privilege of reserving for its Brief in No. 21,966 – now due almost simultaneously with this reply brief in Nos. 22,089 and 21,966, and whose due date a pending Company motion seeks to extend – its discussion of the issues presented in No. 22,089 regarding the discharged strikers whom the Board required the Company to reinstate (see p. 4, n. 5 of the Company's typewritten brief in No. 22,089). To the extent that this

reply brief relates to No. 22,089, it is necessarily limited to certain contentions in the No. 22,089 brief already filed by the Company—which amounts to respondent Company's initial brief in that case.[1]

No. 22,089

1. In attempted support of the Company's contention that its pre-strike refusal to bargain was motivated by a good-faith doubt of majority, derived partly from Company President Beaver's reading of an article written by Company counsel, the Company strenuously insists (typewritten brief, p. 39) that Beaver received the article prior to September 16, rather than on that date as the Board found. However, this contention furnishes no support to the Company's cause, in view of Beaver's own testimony that he did not actually *read* the article until the second week of the strike which protested his refusal to bargain (A. 706).[2] Accordingly, the contents of the article could not have motivated Beaver's pre-strike refusals to bargain, regardless of when he received it.

2. The Company's brief does not dispute the propriety of the Board's finding that it unlawfully threatened and coercively interrogated its employees concerning their union activities. There is no merit whatever to the Company's contention (typewritten brief, p. 56) that these unfair labor practices through September 21 cannot as a matter of law evidence that its September 21 and 23 refusals to bargain were in bad faith because it committed no subsequent violations of the Act.[3] *N.L.R.B. v. Crean*, 326 F.2d

[1] By order dated May 21, 1969, after this brief had been filed in typewritten form, the Court extended the due date for the Company's brief in No. 21,966, with leave to the Board to file a supplemental reply brief which the Board has since filed.

[2] "A." references are to the appendix. Occasional "Tr." references are to portions of the transcript not in the appendix. "G.C. Ex." references are to General Counsel's exhibits not in the appendix.

[3] While the Company did unlawfully discharge and refuse to reinstate certain strikers at the end of the strike (see pp. 56-57, of our opening brief), we make no contention that this showed bad faith in the Company's refusal to bargain.

391, 396-397 (C.A. 7, 1964); *N.L.R.B. v. Boot-Ster Mfg. Co.*, 361 F.2d 325 (C.A. 6, 1966); *Smith Transfer Co. v. N.L.R.B.*, 204 F.2d 738 (C.A. 5, 1953), enforcing, 100 NLRB 834, 840-849 (1952).[4] The cases cited by the Company furnish no support for its highly unrealistic contention that its unlawful anti-union conduct which began the day of the Company's initial refusal to bargain, was continuing on the very day of its second re-refusal to bargain, and continued until two days before its third refusal, is devoid of probative effect as to the motives which underlay such refusals.[5] We note, moreover, that the Company management personnel who decided on the refusal to bargain themselves participated in the unfair labor practices, including discharge threats. See the conduct of Company President Beaver and Company Vice-President Dilliplane discussed on pp. 11-14, 21-22 of our opening brief (cf Co. typewritten brief, pp. 53, 54).

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[4] See also, *N.L.R.B. v. George Groh & Sons*, 329 F.2d 265 (C.A. 10, 1964); *Retail Clerks Union, Local No. 1179 v. N.L.R.B.*, 376 F.2d 186 (C.A. 9, 1967); *Snow v. N.L.R.B.*, 308 F.2d 687 (C.A. 9, 1962); *N.L.R.B. v. Armco Drainage*, 220 F.2d 573 (C.A. 6, 1955), cert. denied, 350 U.S. 838; *N.L.R.B. v. Kellogg's, Inc.*, 347 F.2d 219 (C.A. 9, 1965).

[5] Wholly applicable to the instant case is the language, "* * * it is a reasonable conclusion that the employer did not suddenly suffer a change of heart * * * [The Company] has transgressed the bounds of permissible conduct to a sufficient extent to permit the Board to conclude that its refusal to bargain was as ill-intentioned as its other actions." *Joy Silk Mills v. N.L.R.B.*, 87 U.S. App. D. C. 360, 370, 185 F.2d 732, 742 (1950), cert. denied, 341 U.S. 914. *N.L.R.B. v. United Mineral & Chemical Corp.*, 391 F.2d 829, 838 (C.A. 2, 1968), and *Pulley v. N.L.R.B.*, 395 F.2d 870, 877 (C.A. 6, 1968), found non-probative of bad faith doubt the commission of unfair labor practices prior to any majority claim (here, the unfair practices found began immediately after the September 18 bargaining demand); however, *United Mineral* commented that "unfair practices, whether before or after the union's claim of majority status, are relevant to the contention that the employer would not have recognized the union no matter what the facts turned out to be." In short, the cases cited in nn. 75-77, p. 56 of the Company's typewritten brief stand merely for the proposition that the commission of unfair labor practices near the time of a refusal to bargain does not automatically require an inference of bad faith. See, *e.g.*, footnote 3, *supra*.

3. The Company's attempts to enlarge the size of the appropriate unit involve certain irrelevancies and misconceive the Board's unit holding. The irrelevancies are the Company's contention (typewritten brief, pp. 61-63) that the Board should have included in the unit David Weaver, Robert Paige, Jay Leister, Ralph Van Art, Clair Gingrich, Harold Leister, and Russell Fultz. However, because their unit placement could not affect the Union's majority status, the Board found it unnecessary to pass on their status (A. 1060, n. 13, see 1023(5), 1024-1026 (8-10, 12-14), and p. 58 of the Company's typewritten brief). Our opening brief's discussion of the majority issue assumes their inclusion *arguendo* (see especially p. 32 of our opening brief).

The Company further errs in its assertion (typewritten brief, p. 58) that the Board did not pass upon the Company's contention that the drivers should be included in the unit. The Board excluded them (A. 1021-1022), and properly so (see pp. 26-28 of our opening brief).[6]

4. The Company's efforts to exclude card-signer John Rothrock from the unit (typewritten brief, p. 64, n. 92) are misplaced. Rothrock, who testified on the Company's behalf, testified that he was a Company employee and that he had been solicited to sign a union card "mostly in the Bakery" (A. 642-644). About June 10, 1966, after the close of the initial hearing, counsel for the General Counsel filed a motion with the Trial Examiner to correct the transcript by, *inter alia,* adding Rothrock's name to the

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[6] The Examiner found that there were 8 drivers, including Paige, Weaver and J. Leister (A. 1020, n. 21). These 3 employees performed functions in addition to driving, and the Board found it unnecessary to pass on their unit placement since it could not affect the Union's majority (A. 1060, n. 12, see A. 1025-1026).

list of employees stipulated to be in the unit, as "obviously an inadvertent omission." The motion pointed out that parties had stipulated that the list contained 52 names, and that as the record then stood, there were only 51 (A. 260-261). The Company opposed this motion on the ground that counsel had "no independent recollection that [this] proposed [correction was] uttered by witnesses at the hearing." However, the Company has never denied that Rothrock was in fact a production and maintenance employee. The Examiner granted the motion (A. 1022, n. 27), and we submit that the Company has made no showing of error.[7]

5. In support of its contention that the Board's order is vitiated by strike violence allegedly attributable to the Union, the Company heavily relies (typewritten brief, pp. 19-20, 73) on a post-strike settlement agreement—executed by the Board's Regional Director and by the Company—in which the Union, without admitting to any violation of the Act, undertook to post a notice that it would not engage in certain kinds of coercive conduct (A. 1010E-1010F). The Board properly failed to rely on the settlement agreement as proof of union misconduct. *N.L.R.B. v. Local 926, International Union of Operating Engineers*, 267 F.2d 418, 420-421 (C.A. 5, 1959); cf. *N.L.R.B. v. Superior Tool & Die Co.*, 309 F.2d 692, 695 (C.A. 6, 1962).

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[7] The Company also seeks to exclude Rothrock's card, as well as McConnaughy's, on the ground that they were obtained by coercion (typewritten brief, pp. 63-64). As the Examiner noted (A. 1044), Rothrock's testimony relied on by the Company (which it elicited from him as its witness by a leading question on direct examination) was "extremely vague"; concededly, nothing was said about his job; and on cross-examination he admitted that he signed a card of his own free will, that no threats were made to him, and that it was his wife who said it would be rough on him (A. 1044; 645, 648, Tr. 644, 647, 649). There is no evidence as to any specific statements to McConnaughy; and Beaver testified that when McConnaughy complained of being "harassed" to sign a card, Beaver said the matter was up to him, after which McConnaughy signed a card (A. 1044; 671). We submit that both cards were properly counted. *International Union, UAW v. N.L.R.B.*, 129 U.S. App. D.C. 196, 202, 392 F.2d 801, 807 (1967), cert. denied, 392 U.S. 906; *N.L.R.B. v. Haddock-Engineers, Limited*, 215 F.2d 734, 736-737 (C.A. 9, 1954).

As to the Company's further contention (typewritten brief, p. 12, n. 10) that Union official Bacon was aware of improper tactics used by employee Beatty in obtaining the authorization card of employee Bobb, Bobb's testimony (which the Examiner credited, A. 1029) shows that Beatty "called [Bacon] over" after the portion of the conversation which revealed Beatty's misconduct had ended (A. 301-302).[8]

6. In support of its contention that the signatures on the authorization cards were coerced, the Company relies (typewritten brief, pp. 15-16) on pressure allegedly exerted on employee witnesses who (except for one non-unit employee) never signed cards.[9] Nor is there evidence that these employees told others about such incidents.

7. A substantial part of the Company's brief is directed to the contention that it was improperly denied the right to cross-examine employees about the circumstances under which they executed their authorization cards. At the original hearing, counsel for the General Counsel offered the cards in question into evidence on the strength of testimony by Union representative Bacon that blank cards had been distributed at each of two union meetings and that the executed cards were returned to Bacon at the

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[8] There is, of course, no inconsistency between the Board's finding that Beatty was the Union's agent for the purpose of demanding recognition on September 21, and its failure to find that he was the Union's agent for other purposes (see Company typewritten brief, p. 12, n. 10). The uncontradicted evidence establishes that Union representative Bacon asked Beatty to demand Union recognition on September 21 (A. 1014; 46, 170). There is no evidence whatever that the Union ever authorized Beatty to do anything else. Although the Company states (typewritten brief, p. 44, n. 66) that "Beatty can in no sense be considered 'the Union,'" statements attributed to "the Union" in the Company's typewritten brief (sentence beginning on page 2 and ending on page 3) were assertedly made by Beatty.

[9] This exception was non-unit employee Earnest, who thereafter, upon admitting that he had signed a card, was subjected to improper pressure by Company President Beaver (see pp. 12, 21, 45, of our opening brief).

close of one of these meetings (A. 41-43, 47-51, 70-71).[10] During the hearing, the Company subpenaed all of the 48 employees whose names appear on these cards (A. 928). However, the Company elected to call only 9 of these employees, each of whom it thoroughly examined as to the circumstances under which he signed his card.[11]

Although the Examiner received the cards into evidence at the hearing, in his original decision he found that many of them had not been properly authenticated (A. 1028-1030). Upon exceptions by counsel for the General Counsel, the Board held that the evidence of authentication was sufficient under the Board law in existence during the hearing,[12] but in view of the Board's post-hearing decision in *Henry Colder Co.* (see *infra*, pp. 9-10) remanded the case to the Examiner "for the sole purpose of adducing further evidence bearing on the question of the authenticity of the signatures on union authorization cards" (A. 983-984). Although the Company had again subpenaed all of the 48 employees whose names appeared on the cards, at the remand hearing it made no effort to call any of these employees to determine whether their signatures had been obtained by coercion or misrepresentation (A. 876-877, 928). The Company's due-process claim is

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[10] Bacon received Allenbaugh's card (G.C. Ex. 2a, A. 939) from another employee a few days after September 21 (A. 71-72). However, Allenbaugh, who testified for the Company, averred that she had signed her card before the strike (A. 1027-1028; 374-376). She decided to let the card stand, and made no attempt to get it back, even after she learned that two other employees had not signed cards as the employee solicitor had told her (A. 1028, n. 35; 376-377). Accordingly, her card was valid. *Amalgamated Clothing Workers v. N.L.R.B.*, 124 U.S. App. D.C. 365, 473, 365 F.2d 898, 908 (1966). Cf. Company typewritten brief, p. 64.

[11] Lester Bobb, Jr. (A. 297-302); John Paden (A. 310-312); Gary A. Rhodes (A. 338-339); Gary Marsh (A. 350-351); Dorothy Allenbaugh (A. 374-377); Lehman Gilbert (A. 379); William Russell (A. 390-391); Richard Grove (A. 435-436); and John Rothrock (A. 643-645, Tr. 646).

[12] See *I. Taitel and Son*, 119 NLRB 910, 912 (1957), enforced, 261 F.2d 1 (C.A. 7, 1958), cert. denied, 359 U.S. 944.

based solely on the Examiner's refusal to permit it to cross-examine as to this issue the 29 employees whom counsel for the General Counsel had called and questioned solely to determine the authenticity of the cards bearing their purported signatures.

It is, of course, hornbook law that the extent of cross-examination with respect to an appropriate subject of inquiry rests in the discretion of the trial court, and it is only in case of clear abuse of such discretion, resulting in manifest prejudice to the complaining party, that a reviewing court will interfere.[13] No such abuse can be shown here. The employees' testimony on direct examination was confined to the question of whether their purported signatures on the cards were genuine. The Company was permitted to cross-examine whatever witnesses it chose about whether they had really signed or authorized the signing of these cards (see, *e.g.*, A. 911-918). The Company's due-process claim rests solely on the Examiner's action in treating, as outside the scope of direct examination, questions directed toward ascertaining the propriety of the means used in obtaining these genuine signatures, and in effect requiring the Company to adduce any such evidence by calling the employees as its own witnesses rather than through cross-examination—the very procedure which the Company had already used with respect to 9 witnesses. We submit that the Examiner's exercise of discretion was wholly reasonable. The employees' testimony about the surrounding circumstances was unnecessary to establish their operative effect, which was shown *prima facie* by the genuineness of the signatures. Indeed, union authorization cards can be sufficiently authenticated and rendered operative by testimony of nonsignatory witnesses whose

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[13] *Howard v. United States*, 128 U.S. App. D.C. 336, 341, 389 F.2d 287, 292 (1967); *Natvig v. United States*, 98 U.S. App. D.C. 399, 402, 236 F.2d 694, 697 (1956), cert. denied, 352 U.S. 1014; *Collazo v. United States*, 90 U.S. App. D.C. 241, 252, 196 F.2d 573, 584 (1952), cert. denied, 343 U.S. 968; *Viereck v. United States*, 76 U.S. App. D.C. 262, 267, 130 F.2d 945, 946 (1942), reversed on other grounds, 318 U.S. 236.

knowledge was limited to the genuineness of the signatures.[14] Furthermore, as this Court has previously noted, employees who have signed union cards over their employer's unlawfully pursued opposition testify under extreme pressure when they are questioned about allegedly invalidating circumstances which surround the execution of cards sought to be used to impose a bargaining obligation.[15] The likely effect of such pressures would be increased if the Company were permitted to use the leading-question privilege of cross-examination to stimulate mutually convenient recollections in its employees. It was wholly reasonable for the Examiner to expect that the Company would adduce any such testimony through non-leading questions to employee witnesses called as its own, as the Company in fact attempted to do by calling 9 employees selected by it.[16]

As previously noted, the Board remanded this case on the basis of its June 20, 1966, remand order in *Henry Colder Co.*[17] The Company attacks

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[14] Thus, cards can be sufficiently authenticated and rendered operative, without the signatories' testimony, by witnesses who saw them signed, or by a handwriting expert's comparison of signatures. See the cases cited on p. 31 of our main brief; see also, *N.L.R.B. v. Merrill*, 388 F.2d 514, 519 (C.A. 10, 1968). The Company's strenuous attack (without citation of authority) on these cases (typewritten brief, p. 22, n. 29, pp. 66-68) implicitly concedes that they seriously undermine the Company's position as to its rights when the cards were authenticated by the signers.

[15] *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. N.L.R.B.*, 129 U.S. App. D.C. 196, 203, 392 F.2d 801, 808 (1967), cert. denied, 392 U.S. 906. See also, *N.L.R.B. v. Southbridge Sheet Metal Works*, 380 F.2d 851, 855 (C.A. 1, 1967).

[16] Cf. *Bryant Chucking Grinder Co.*, 160 NLRB 1526, 1527, n. 2 (1966), enforced, 389 F.2d 565 (C.A. 2, 1967), cert. denied, 392 U.S. 908, where the Board upheld the examiner in requiring the employer to refrain from leading questions about such matters until the employee witness' recollection had been exhausted. No such solution was suggested by the Company here. We note that although the Company alleges that turnover in the unit is high (typewritten brief, p. 70), all of the 9 card-signers whom the Company elected to call as its own witnesses were still in its employ.

[17] The final Board decision in that case is reported at 163 NLRB No. 13 (February 24, 1967). The *Colder* remand order is unreported, but is essentially similar to that issued here.

the ruling of Trial Examiner Kapell here largely because, in the hearing held pursuant to the *Colder* remand and prior to the remand hearing herein, Trial Examiner Bush did permit cross-examination of employee witnesses as to the circumstances surrounding their execution of the cards. This alleged disagreement between Examiners Kapell and Bush does not, of course, establish that either committed reversible error (see the cases cited on p. 8, n. 12, *supra*). In any event, because no exceptions were filed to this ruling by Examiner Bush in *Colder*, the Board never had occasion to determine its propriety. See Sec. 102.46(h) of the Board's Rules and Regulations, 29 CFR 102.46(h). Indeed, the *Colder* examiner could not have committed "prejudicial error" by permitting such cross-examination, inasmuch as he sustained the validity of all the cards.

8. As shown on pp. 36-38 of our opening brief, the Examiner and the Board did not commit prejudicial error by closing the hearing without awaiting the Company's enforcement of its subpena requiring the Union to produce its financial records as to who was paid strike benefits. Contrary to the Company's claim (Point V, typewritten brief, pp. 34-35), even assuming that these records showed that a majority of the employees had not struck in support of the Union's bargaining demand, this would not establish that only a minority of the employees wanted the Company to recognize the Union. *Henry Spen & Co.*, 150 NLRB 138, 149 (1964); *Sierra Furniture Co.*, 123 NLRB 1198, 1198-1199 (1959). An employee's unwillingness to undergo wage losses resulting from a recognition strike is hardly inconsistent with a continued desire that his employer voluntarily recognize a bargaining representative which the employee previously authorized to represent him. We note, moreover, that the Company attempted to increase the prospective economic disadvantages of participating in the strike by threatening that strikers would be discharged (see pp. 12-14, 21-22, of our opening brief).

9. Nor is there merit to the Company's contention (typewritten brief, pp. 70-71) that because of the long interval between the date of its unlawful refusal to bargain and the date of the Company's answering brief, during which period the identity of the employees in the unit has allegedly changed to a substantial degree, a Board-supervised election is called for "at most." To the extent that the Company is relying upon events which allegedly occurred prior to the issuance of the Board's bargaining order, the Company's contention in this respect would appear to be barred by Section 10(e) of the Act, inasmuch as the Company responded to this order merely by filing a petition to review the Board's order, without then contending (indeed, without contending until some 10 months later) that the bargaining order was inappropriate by reason of these alleged events (see pp. 2, 6 of the Board's main brief herein). *Glaziers' Local 558 v. N.L.R.B.*, __ U.S. App. D.C. __, 408 F.2d 197, 202-203 (1969); see also the cases cited in n. 19, p. 16, *infra*. Nor, of course, is there any record evidence to support the Company's statement regarding the identity of the employees now in the unit.

In any event, this contention is refuted by decisions of both the Supreme Court and this Court. Thus, on at least four occasions, the Supreme Court has unqualifiedly affirmed an unconditional bargaining order even though the union involved had or might have lost its majority support. In *N.L.R.B. v. P. Lorillard Co.*, 314 U.S. 512 (1942), the Board had found that the employer had unlawfully refused to bargain collectively with the union designated by the employees as their bargaining agent and ordered the employer to bargain with it. The court of appeals upheld the Board's unfair labor practice finding "but, expressing the belief that because of lapse of time and changed conditions the Local might no longer represent the majority of the employees, modified the Board's order so as to require

it to conduct an election to determine whether the Local had lost its majority due to a shift of employees to a rival independent association," 314 U.S. at 513. The Supreme Court reversed the court of appeals *per curiam*, stating that it "was for the Board to determine" whether the most appropriate remedy would be to direct the employer to bargain with the union which had a majority on the date of the employer's unlawful refusal to recognize it.

Two years later, the Court again approved the issuance of a bargaining order "despite the union's subsequent failure to retain its majority." *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702 (1944). The Court held that (321 U.S. at 705):

> were [the Board] not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligations.

Concluding that "the Board was within its statutory authority" in ordering the employer to bargain, the Court further found that, "Contrary to [the employer's] suggestion, this remedy does not involve any injustice to employees who may wish to substitute for the particular union, some other bargaining agent or relationship." Such a remedy "is not intended to fix a permanent bargaining relationship" but does contemplate that such a relationship "once rightfully established must be permitted to exist and function for a reasonable period." 321 U.S. at 705.

In 1962, the Supreme Court rejected, as without merit, the contention that "because of the lapse of time between the occurrence of the unfair labor practice and the Board's final decision and order, and because the

union was repudiated by the employees subsequent to the events recounted in this opinion, enforcement [of the bargaining order] should be either denied altogether or conditioned on the holding of a new election to determine whether the union is still the employees' choice as bargaining representative." *N.L.R.B. v. Katz*, 369 U.S. 736, 745, n. 16. Finally, in 1964 the Court summarily reversed, on the Board's petition for certiorari, the action of the Seventh Circuit in conditioning a bargaining order on the union's winning a new election. *N.L.R.B. v. Progressive Mine Workers*, 375 U.S. 396, reversing 319 F.2d 428 (1963). The Seventh Circuit had held (319 F.2d at 437) that the policies of the Act would be best served by conditioning the bargaining order on the union's winning an election. In reversing, the Supreme Court cited its decisions in *Katz*, *Franks Bros.*, and *Lorillard*.

A similar result has over and over again been reached by this Court. *Joy Silk Mills v. N.L.R.B.*, 87 U.S. App. D.C. 360, 372, 185 F.2d 732, 744 (1950), cert. denied, 341 U.S. 914; *United Steelworkers v. N.L.R.B.*, 126 U.S. App. D.C. 215, 217-218, 376 F.2d 770, 772-773 (1967), cert. denied, 389 U.S. 932; *United Automobile Workers v. N.L.R.B.*, 129 U.S. App. D.C. 196, 202, 392 F.2d 801, 807 (1967), cert. denied, 392 U.S. 906; *Amalgamated Clothing Workers v. N.L.R.B.*, 125 U.S. App. D.C. 275, 280, 371 F.2d 740, 745 (1966); *United Automobile Workers v. N.L.R.B.*, 124 U.S. App. D.C. 215, 217-218, 363 F.2d 702, 704-706 (1966), cert. denied, 385 U.S. 973; *Amalgamated Clothing Workers v. N.L.R.B.*, 124 U.S. App. D.C. 365, 373-376, 365 F.2d 898, 906-909 (1966); *N.L.R.B. v. S.N.C. Mfg. Co.*, 122 U.S. App. D.C. 145, 352 F.2d 361 (1965), cert. denied, 382 U.S. 902. See also, *Sakrete of Northern California, Inc. v. N.L.R.B.*, 322 F.2d 902, 909 (C.A. 9, 1964), cert. denied, 379 U.S. 961 (where the court enforced a bargaining order despite a complete turnover of personnel between the time the unfair labor practices were committed and the date of the Board's order

and the court's enforcement of that order); *N.L.R.B. v. Storack Corp.*, 357 F.2d 893, 895-897 (C.A. 7, 1966). Contra: *N.L.R.B. v. Pembeck Oil Co.*, 404 F.2d 105, 112-113 (C.A. 2, 1968), Board's petition for cert. pending (No. 1273); *N.L.R.B. v. Better Val-U Stores of Mansfield*, 401 F.2d 491, 494-496 (C.A. 2, 1968);[18] *Clark's Gamble Corp. v. N.L.R.B.*, 407 F.2d 199, 201-202 (C.A. 6, 1969).[19]

No. 21,966

1. The Board's ultimate position in No. 21,966 is the same as that taken by the Company, whose brief as intervenor in that case is presently due about the same date as this reply brief. However, the Board disagrees with the Company's apparent position that the Board would have been procedurally barred from finding that the Company violated the Act by rejecting the October 20 application for reinstatement, and from requiring back pay from that date until the strikers were actually reinstated, even

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[18] Cf. *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 183 (C.A. 2, 1962), cert. denied, 370 U.S. 919, where the same circuit, speaking through Judge (now Mr. Justice) Marshall, stated:

> The union lost majority status because of respondent's violation of the law. The only effective remedy left in the present case is the requiring of recognition. And, indeed, as far as future cases are concerned, denial of power to the Board here might well encourage employers to refuse to bargain, commit the ancillary violations, fight the unfair labor practice charges to the courts, and then rely upon the inevitable turnover in personnel to ward off the only effective remedy remaining.

Both *Pembeck* and *Better Val-U* relied upon the majority opinion in *N.L.R.B. v. Flomatic Mfg. Co.*, 347 F.2d 74 (C.A. 2, 1965). In *United Steelworkers, supra*, 126 U.S. App. D.C. at 218, 376 F.2d at 773, this Court observed, "In our view the beacon with the light that guides this court is not the *Flomatic* opinion, but the partial dissent of Judge Hays, 347 F.2d at 80-81."

[19] Cf. the Sixth Circuit's decision in *Thrift Drug Co. v. N.L.R.B.*, 404 F.2d 1097 (1968), employer's petition for cert. pending, No. 906.

if the Board had found (as it did not) that the application was in law "unconditional" (see pp. 60-63 of our opening brief).

The Company appears to be relying on the fact that the complaint did not in terms allege that the refusal to reinstate the strikers (other than the 7 who were discharged, pp. 51-57 of our main brief) constituted a statutory violation. However, the complaint did in terms allege that the strike was an unfair labor practice strike (G.C. Ex. 1(h), para. 15), which circumstance imposed on the Company the statutory duty to honor an "unconditional" request for reinstatement (see pp. 57-59 of our opening brief). At the hearing, the parties litigated the Section 8(a)(5) refusal-to-bargain allegation of the complaint (which was found); the causation of the strike (alleged in the complaint to be an unfair labor practice strike, and shown by the undisputed record evidence as having been caused by the refusal to bargain); the contents of the application for reinstatement; and the Company's action in connection therewith, including the legality (expressly put at issue by the complaint) of the Company's discharge of and refusal to reinstate 7 strikers. As shown on pp. 57-63 of our main brief, if the complaint had been sustained as to all of the 7 discriminatees, the Company's refusal to honor the October 20 application would have violated the Act. The Examiner expressly discussed the propriety of the refusal to honor that application, although he found the Company's refusal lawful (1) because of his finding (reversed by the Board) that the refusal to bargain which caused the strike was not an unfair labor practice, and (2) because of his finding (adopted by the Board) that the application for reinstatement was conditional in law because conditioned on the reinstatement of 4 strikers lawfully discharged and refused reinstatement (A. 1036-1037). The Company's exceptions and briefs to the Board did not assert that the Examiner's discussion was irrelevant as *dehors* the

complaint.[20] Under these circumstances, we submit that if the Board had sustained the complaint as to the discharge of all 7 named strikers, it would have properly found that the Company violated the Act by rejecting the application for reinstatement. *United Packinghouse Workers v. N.L.R.B.*, __ App. D.C. __, __ F.2d __, 70 LRRM 2489, 2494, n. 12, 59 L.C. para. 13254 (Feb. 7, 1969, Nos. 21627 and 21825). See A. 1060. In any event, the Board could properly have remedied the unlawful refusal to bargain by requiring back pay, to the employees who struck in protest, for the period between an "unconditional" application for reinstatement and the date on which they were reinstated.[21]

2. The Union's brief tacitly assumes that the October 20 application for reinstatement would be rendered "unconditional" in law should the Court find that the Board erred in failing to require the reinstatement of 4 discharged strikers under the *Thayer* doctrine (see pp. 51-52 of our main brief; see also, *Food Employees Union, Local 347, Amalgamated Meat Cutters v. N.L.R.B.*, __ U.S. App. D.C. __, __ F.2d __, 70 LRRM 3436, 3437, 60 L.C. para. 10048 (April 22, 1969, Nos. 21155 *et al.*). However, such a finding would be distinguishable from a finding that the Board erred in failing to find that the Company committed an unfair

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[20] Cf. *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745, International Brotherhood of Teamsters v. N.L.R.B.*, 128 U.S. App. D.C. 383, 385, 389 F.2d 553, 555 (1968); *N.L.R.B. v. Midwestern Manufacturing Co.*, 388 F.2d 251, 253 (C.A. 10, 1968); *American Fire Apparatus Co. v. N.L.R.B.*, 380 F.2d 1005, 1006 (C.A. 8, 1967); *Borden Cabinet Corp. v. N.L.R.B.*, 375 F.2d 891, 892 (C.A. 7, 1967), cert. denied, 389 U.S. 841; *N.L.R.B. v. International Union of Operating Engineers, Local 66*, 357 F.2d 841, 846 (C.A. 3, 1966).

[21] *Local 833 v. N.L.R.B.*, 112 U.S. App. D.C. 107, 108-109, 300 F.2d 699, 700-701 (1962), cert. denied, 370 U.S. 911; *N.L.R.B. v. Kohler Co.*, 122 U.S. App. D.C. 101, 351 F.2d 798 (1965); *Rutter-Rex Mfg. Co. v. N.L.R.B.*, 399 F.2d 356, 360-361 (C.A. 5, 1968), employer's petition for cert. denied, 393 U.S. 1117, Board's granted, March 3, 1969. Cf. *Dallas General Drivers, supra.*

labor practice by discharging and refusing to reinstate them. *Dallas General Drivers, supra,* 128 U.S. App. D.C. at 385, 389 F.2d at 555. Accordingly, should the Court find that the Board properly dismissed the complaint as to these employees, but erred in failing to order their reinstatement under the *Thayer* doctrine, the case should be remanded to the Board to determine whether under such circumstances the Company was obligated to honor the October 20 reinstatement request.

CONCLUSION

For the reasons stated herein and in our main brief, we respectfully submit that the petition for review should be denied, and that a decree should issue enforcing the Board's order in full.

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May 1969.

Nos. 21,966 and 22,089

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO., *Intervenor.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO., *Respondent.*

On Petition to Review and on Petition for Enforcement of an Order of the National Labor Relations Board

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD TO SUPPLEMENTAL BRIEF FILED BY THE COMPANY FOLLOWING PROCEEDINGS PURSUANT TO REMAND

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INDEX

AUTHORITIES CITED

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* Cases or authorities chiefly relied upon.

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD TO SUPPLEMENTAL BRIEF FILED BY THE COMPANY FOLLOWING PROCEEDINGS PURSUANT TO REMAND

On November 13, 1970, the Company filed a supplemental brief herein. This reply brief by the Board in response to such supplemental brief by the Company is filed pursuant to an order issued by this Court on October 13, 1970.

1. The Company's contention (sup. br. pp. 8-12) that the authorization cards herein were ambiguous has never heretofore been raised and, therefore, is not properly before the Court.[1] In any event, this contention is plainly without merit. The cards state that the signatory employee "hereby authorize[s] the American Bakery and Confectionery Workers' International Union, AFL-CIO, Local , as my exclusive bargaining agent respective to wages, hours and working conditions and with authority to file a petition for bargaining relative to union security between myself and the above-mentioned company" (A. 939-946). In *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 584 (1969), the Supreme Court defined an unambiguous card as one "which unequivocally states on its face that the signer authorizes the union to represent the employees for collective bargaining purposes." This card indisputably does that. The *additional* authority granted by the card – "to file a petition for bargaining relative to union security" – deals with a matter which is severable from recognition generally. Cf. *N.L.R.B. v. Penn Cork & Closures, Inc.*, 376 F.2d 52 (C.A. 2, 1967), cert. denied, 389 U.S. 843.

Moreover, the Supreme Court made clear that the possible vice in so-called "dual purpose" cards is the same vice which may be introduced by a solicitor's contemporaneous remarks – that is, the words may be "calculated to direct the signer to disregard and forget the language above his signature." *Gissel, supra*, 395 U.S. at 606-608. We submit that the additional authority granted by this card – apparently for use before a state board where applicable – does nothing to dilute the authority unequivocally

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[1] See *United States v. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952); *Glaziers' Local 558 v. N.L.R.B.*, 132 U.S. App. D.C. 394, 399-400, 408 F.2d 197, 202-203 (1969); *Dallas General Drivers, Local 745 v. N.L.R.B.*, 128 U.S. App. D.C. 383, 385, 389 F.2d 553, 555 (1968); *Carpenters District Council of Detroit v. N.L.R.B.*, 109 U.S. App. D.C. 209, 213-214, 285 F.2d 289, 293-294 (1960).

granted by the earlier passage. Indeed, we submit that at least where (as here) the employer does not recognize a union, an employee's willingness to authorize a union to take steps to compel him to be a union member in order to keep his job indicates, even standing alone, that employee's desire to be represented by the union.

2. As previously noted, the Board found it "unlikely that the effect of [the Company's] unfair labor practices could be neutralized by conventional cease and desist remedies which would ensure a fair election. * * * the employees' desires as expressed through the authorization cards are a more reliable measure of their stand on the issue of representation, and * * * the policies of the Act will be better effectuated by the issuance of a bargaining order." There is no merit to the Company's contention (br. pp. 21-24) that in making this determination, the Board erred in relying on the Company's unlawful discharge of 3 strikers when the strikers sought to return to work. As is shown by the Examiner's analysis of the evidence regarding the strikers' conduct during the strike (A. 24-26), before the Board the Company sought to defend their discharge on the basis of evidence which the Examiner discredited, and on the basis of conduct which occurred after their discharge. While the Company is correct in pointing out that the Board's unlawful-discharge conclusion did not turn on any finding that these discharges "were for the purpose of destroying organizational efforts" (br. p. 23), the alleged absence of such a purpose does not affect the support which such discharges supply to the propriety of the bargaining order.[2] As pointed out on p. 53, n. 55, of our main brief

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[2] The Board did not rely thereon in initially issuing its bargaining order, since their discharge was not found to be for an unlawful purpose and that order was predicated on a finding that the Company's refusal to bargain was not motivated by a good faith doubt of majority. However, as the Company concedes (br. pp. 4, n. 4, 34-35), *Gissel* teaches (395 U.S. at 592) that the Company's motives for refusing to recognize the (cont'd)

with Floyd Leister, the Company disregards Lash's statement that the Company suspected employee Hoar (whom Lash had previously interrogated about the Union) of being a Union "instigator," and that Leister should "Keep your ears open today and see what you can find out and let me know."[5] In asserting that interrogated employee Moore "was threatened by the Union" (br. p. 29 n. 33), the Company relies solely on its production manager's hearsay statement (uncorroborated by Moore) that Moore told him of a threat from an unidentified source (A. 471).

4. We have shown on pp. 6-9 of our July 1970 supplemental brief the error in the Company's contention (br. pp. 46-50) that the bargaining order should not be enforced because of lapse of time and alleged intervening employee turnover. Likewise without merit is the Company's contention (br. pp. 46-47) that the bargaining order herein should not be enforced because of "Board-occasioned" delay. Much of the delay in these proceedings is attributable to the Company[6] or to circumstances for which no party is responsible.[7] In any event, even if the Company could establish

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[4] (cont'd)

> action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion * * *.

See also, *International Union of Electrical Workers v. N.L.R.B.*, 110 U.S. App. D.C. 91, 96-97, 289 F.2d 757, 762-763 (1960); *Mon River Towing, Inc. v. N.L.R.B.*, 421 F.2d 1, 9-11 (C.A. 3, 1969).

[5] Compare pp. 27-28 of the Company's brief with A. 1058, 1016; 197-198 and pp. 13-14, 22-23 of our March 1969 brief.

[6] More specifically, the Company has asked the Board, the Court of Appeals for the Third Circuit, and this Court for extensions in this case on about 12 separate occasions, and has obtained extensions totalling approximately five and a half months.

[7] Although the Union's petition for review herein was filed in late May 1968, the ultimate venue of the proceeding was not finally determined until late January 1969 – more than 8 months later – because the Company subsequently filed a petition for review in the Third Circuit, unsuccessfully opposed the Board's motion to transfer that (cont'd)

(as it cannot) that the unfortunate delays in this proceeding were the Board's fault, the Court would not be warranted in rejecting the Board's order requiring the Company to bargain with the Union as its employees' representative. Thus, *N.L.R.B. v. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), held that the Board's 4-year delay in issuing a back-pay specification provided no occasion for mitigating an employer's pecuniary liability. In fully upholding the Board's backpay order, the Court declared (396 U.S. at 264-265):

> Assuming without deciding that the delay in issuing the [backpay] specification did violate the Board's duty of prompt action under the Administrative Procedure Act, it does not follow that enforcement of the full back-pay remedy, was an abuse of the Board's discretion * * *. This Court has held before that the Board is not required to place the consequences of its own delay, *even if inordinate*, upon wronged employees *to the benefit of wrongdoing employers*. *N.L.R.B. v. Electric Cleaner Co.*, 315 U.S. 685, 698 (1942); *Labor Board v. Katz*, 369 U.S. 736, 748, n. 16 (1962). (Emphasis added.)[8]

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[7] (cont'd) proceeding to this Court pursuant to 28 U.S.C., Section 2112(a), and then unsuccessfully moved this Court to transfer the proceeding to the Third Circuit. In addition, in early 1967 (before issuing its original decision herein), the Board remanded the case to the Trial Examiner for further hearings because of a change in Board law after the close of the initial hearing (see p. 7 of our May 1969 reply brief and p. 29 of our March 1969 brief), with the Examiner's supplemental decision not issuing until July 1967, more than 5 months later (A. 929); in 1969 this Court *sua sponte* postponed the oral argument on two separate occasions (see p. 2 of our supplemental brief); and the Court thereafter remanded the case for further proceedings in light of *Gissel*, decided the day before the date on which the oral argument was initially scheduled.

[8] In *N.L.R.B. v. Katz*, *supra*, 369 U.S. at 748, n. 16, the Court stated:

> The Company argues that, because of lapse of time between the occurrence of the unfair labor practices and the Board's decision and order [about 2½ years], and because the union was

(cont'd)

See also, *Bryant Chucking Grinder Co. v. N.L.R.B.*, 389 F.2d 565, 568 (C.A. 2, 1967), cert. denied, 392 U.S. 908; *N.L.R.B. v. Staub Cleaners*, 418 F.2d 1086, 1089-1090 (C.A. 2, 1969), cert. denied, 397 U.S. 1038. Indeed, that such delays do not render a bargaining order inappropriate is indicated by the language from *Gissel* quoted on pp. 6-8 of our July 1970 supplemental brief.

5. The Company's brief (p. 15) renews its contention that the Board erred in refusing to permit the Company to establish that a majority of the employees had not participated in the strike, on the ground that such a showing would have established the Union's lack of majority. We respectfully draw the Court's attention to the following language in *N.L.R.B. v. Frick Co.*, 423 F.2d 1327, 1333 (C.A. 3, 1970), decided after the instant case was remanded to the Board:

> * * * *the Board correctly concluded that, "even in the absence of unfair labor practices, there is no presumption that an employee's return to work during a strike demonstrates a rejection of the union as his bargaining representative." That the employees returned may have been nothing more than "a vote of no confidence in the strike action, and [was] not necessarily a repudiation of the Union in its representative capacity." *West Fork Cut Glass Co.*, 90 NLRB 944, 956 (1950), enforced in relevant part, 188 F.2d 474 (4 Cir.

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[8] (cont'd)

> repudiated by the employees subsequent to the events recounted in this opinion, enforcement should be either denied altogether or conditioned on the holding of a new election to determine whether the union is still the employees' choice as bargaining representative. The argument has no merit * * * *Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except in Section 10(b).* (Emphasis supplied.)

> 1951). The Company could not, therefore, rationally assume that the returning strikers had abandoned the Union.

Moreover, the Court added, "if the strike had been settled at an early date and not prolonged by [the employer's] unfair labor practices, . . . there may never have been 202 strikers who abandoned the strike."

6. Most of the Company's due-process contentions really amount to attacks on *Gissel* itself and the decisions of the Courts of Appeals (including this Court) which were obedient thereto. Thus, the Company's contention that the Board was precluded from deciding this case under the law propounded in *Gissel* because the pre-*Gissel* trial of the case was not predicated on the *Gissel* theory (br. pp. 33-36, 37-39, 40-45) overlooks that in the *Gissel* opinion itself, the Supreme Court remanded three cases for the precise purpose of Board reconsideration in accordance with the *Gissel* standards.[9]

The cases cited in n. 9 likewise establish that a *Gissel*-based remand does not compel the Board to conduct a further evidentiary hearing in the absence of a tender of relevant evidence which was previously unavailable or newly rendered relevant by *Gissel;* or to direct the Trial Examiner to prepare a supplemental decision in light of *Gissel.*[10] The Company's

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[9] Accord: *Atlas Engine Works, Inc. v. N.L.R.B.*, 395 U.S. 828 (1969); *International Ladies' Garment Workers' Union v. N.L.R.B.*, 134 U.S. App. D.C. 318, 319-320, 414 F.2d 1214, 1215-1216 (1969), with the Board's affirmance of its bargaining order approved in *Garland Knitting Mills v. N.L.R.B.*, __ U.S. App. D.C. __, __ F.2d __, 72 LRRM 2686 (Nos. 21785 and 21832, October 29, 1969), cert. denied, 398 U.S. 951; *Thrift Drug Co. v. N.L.R.B.*, 395 U.S. 828 (1969), with the Board's affirmance of its bargaining order approved in 75 LRRM 2431 (C.A. 6, October 8, 1970); *N.L.R.B. v. Pembek Oil Co.*, 395 U.S. 828 (1969), with the Board's affirmance of its bargaining order approved in 75 LRRM 2479 (C.A. 2, October 14, 1970).

[10] The Board was warranted in failing to direct the Examiner to prepare such a decision, since the issues presented by the remand were not factual but called for the (cont'd)

contention that the Board erred in refusing to remand this case to the Trial Examiner seems to rest upon the assertion that it can produce evidence which *Gissel* rendered newly relevant (br. pp. 33, 35, 36-37). While the Company's brief is notably vague about the nature of this alleged evidence, it does appear that the Company seeks (1) to establish intervening turnover among employees; and (2) to produce testimony by employees that the Company's unfair labor practices did not in fact alter their views (see br. pp. 31-33). We have previously demonstrated that such turnover, if shown, would be immaterial (see *supra*, pp. 6-8, and pp. 6-9 of our July 1970 supplemental brief).

Nor did the Board err in declining to reopen the record to receive subjective testimony from the employees about the impact of the Company's unfair labor practices on their union views. Rather, *Gissel* upheld the Board's power to issue a bargaining order in cases where, as here, the employer engaged in practices which have a "*tendency* to undermine majority strength and impede the election process" (395 U.S. at 614, emphases supplied). Consistently with this language, in considering whether the validity of union authorization cards could be impeached by testimony as to the card signers' subjective intent, *Gissel* stated (395 U.S. at 608):

> We also accept the observation that employees are more likely than not, many months after a card drive

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10 (cont'd) Board to make an "expert estimate" based on its particular "fund of knowledge and expertise" (*Gissel, supra*, 395 U.S. at 612, n. 32). "* * * the statute gives the final say * * * to the collegial conclusion of the Board members," who possess, "presumptively, a judgment enhanced by the perspective of experience in affairs and a breadth of gauge that warranted a Presidential nomination to high office and Senate confirmation." *American Federation of Television and Radio Artists v. N.L.R.B.*, 129 U.S. App. D.C. 399, 405, 395 F.2d 622, 628 (1968). See also, *Oil, Chemical & Atomic Workers v. N.L.R.B.*, 124 U.S. App. D.C. 113, 115-116, 362 F.2d 943, 945-946 (1966).

> and in response to questions by company counsel, to give testimony damaging to the union * * * . We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry * * * .

We submit that "a probe of an employee's subjective" feelings is "endless and unreliable" whether directed at his reason for signing a union authorization card (as in *Gissel*) or his reaction to his employer's unfair labor practices (as here). In both situations, such employee testimony calls for "a high degree of introspective perception" (*N.L.R.B. v. Donnelly Garment Co.*, 330 U.S. 219, 231 (1947)),[11] and the employee's testimony is in response to his employer's efforts to impeach his prior choice in order to avoid a bargaining obligation. Accordingly, in both situations, such testimony is highly unreliable and of little probative value.[12]

In sum, *Gissel* compellingly supports the Board's view that the appropriateness of a bargaining order must be assessed on an objective basis – *i.e.*, on whether the employer's misconduct would tend to undermine the union's majority and to prevent the holding of a fair and free election – rather than on the subjective statements of the employees as to whether

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11 See also, *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 51 (1954); *Darlington Mfg. Co. v. N.L.R.B.*, 397 F.2d 760, 772-773 (C.A. 4, 1968), cert. denied, 393 U.S. 1023; *Hendrix Mfg. Co. v. N.L.R.B.*, 321 F.2d 100, 105 (C.A. 5, 1963); *Local 542, Operating Engineers v. N.L.R.B.*, 328 F.2d 850, 852-853 (C.A. 3, 1964), cert. denied, 379 U.S. 826, and cases cited.

12 In suggesting (br. pp. 32-33) that its assertedly "minor" unfair labor practices (br. pp. 25, 30) "produced an effect" of "stiffened employee resistance to the * * * anti-union campaign," the Company relies on Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38 (1964). We note, however, Bok's approval of a bargaining order where (as here) the union had a majority which "was dissipated after an unlawful refusal to bargain by the employer." 78 Harv. L. Rev. at 132-133.

such misconduct coerced them into changing their minds. As shown, under an objective test, the Board was reasonable in concluding that the Company's unfair labor practices tended to effect this result.

CONCLUSION

For the reasons stated herein and in our briefs previously filed in this case, we submit that the petiton for review should be denied, and that a judgment should issue enforcing the Board's order in full.

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November 1970.

Nos. 21,966 & 22,089

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,966

AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO.,

Intervenor.

No. 22,089

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BEAVER BROTHERS BAKING CO., INC., d/b/a AMERICAN BEAUTY BAKING CO.,

Respondent.

On Petition to Review and On Petition for Enforcement of An Order of The National Labor Relations Board

SUPPLEMENTAL REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD TO COMPANY'S SUPPLEMENTAL ANSWERING BRIEF IN NO. 22,089 AND BRIEF IN NO. 21,966

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INDEX

AUTHORITIES CITED

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* Authorities chiefly relied upon.

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SUPPLEMENTAL REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD TO COMPANY'S SUPPLEMENTAL ANSWERING BRIEF IN NO. 22,089 AND BRIEF IN NO. 21,966

This supplemental reply brief to the Company's supplemental answering brief in No. 22,089 and its brief in No. 21,966 is filed pursuant to permission of this Court granted on May 21, 1969.

1. The Company contends (typewritten supplemental answering brief, Point III, pp. 22-26) that the Union has no standing to contend that the Board misapplied the *Thayer* doctrine because the exceptions to the Trial Examiner's decision were allegedly insufficient to raise the *Thayer* issue. However, the Company does not question the Board's power to consider this issue in the absence of sufficient exceptions,[1] and concedes that the Board in fact did so (typewritten brief, pp. 27-30). Indeed, in its brief to the Board the Company relied on the Board's application of the *Thayer* doctrine, pursuant to the First Circuit's opinion in the *Thayer* case.[2] Because the Board's consideration of the issue on its merits rendered irrelevant the function of sufficient exceptions (namely, to give the agency an opportunity to consider the issue),[3] their alleged absence does not now foreclose the Union from contending that the Board's resolution of the merits was erroneous.

The Board treated the *Thayer* issue in its opening brief, and believes the Company errs in contending that this issue is not within the issues as stipulated by the Board and the Union. Unlike the stipulation in *Dallas General Drivers,*[4] the stipulated issues in No. 21,966 included both the question of whether four strikers "were properly discharged" *and* the question of whether they "were not entitled to reinstatement." (A. 931).

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[1] *N.L.R.B. v. Townsend,* 185 F.2d 378, 384 (C.A. 9, 1950), cert. denied, 341 U.S. 909; *N.L.R.B. v. WTVJ, Inc.,* 268 F.2d 346, 348 (C.A. 5, 1959).

[2] *Thayer Co.,* 115 NLRB 1591, 1595-1596 (1956).

[3] Cf. *Glaziers' Local No. 558, a/w Brotherhood of Painters v. N.L.R.B.,* ___ U.S. App. D. C. ___, 408 F.2d 197, 202-203 (1969).

[4] *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745, International Brotherhood of Teamsters v. N.L.R.B.,* ___ U.S. App. D. C. ___, 389 F.2d 553, 555 (1968).

Of course, we continue to urge that the Board's resolution of such issues on the merits was right.

2. The Company's description of the unlawfully discharged strikers' conduct is less than fair. Thus, the Company ascribes to Kelley certain misconduct actually committed by another employee, Romig (A. 1035; 422-423, 727-728, 729-730, cf. p. 5 of the Company's typewritten brief). Further, the Company characterizes the conduct of Floyd (Dick) Leister as "aid[ing] another striker [Hoar] in the attempted sabotage of a Company truck" (typewritten brief, p. 4), – *i.e.*, "When an employee tried to stop Hoar Leister grabbed the employee, swung him around and told him: 'Oh no, you won't' " (typewritten brief, p. 20). However, the record shows that when employee Harold Leister (Floyd's brother) saw Hoar reaching for the truck's distributor, Harold told Hoar to "get your mitts out of there or I will flatten you," and that not until Harold thus threatened to assault Hoar did Floyd grab his brother by the shoulder and say, "Oh, no, you won't" (A. 396).[5] The Company further asserts (typewritten brief, p. 21, n. 10) that "Leister also beat up an employee who tried to drive his car into the bakery," while neglecting to note the credited evidence that this scuffle (which occurred after Leister's unlawful discharge) was provoked when the nonstriker hit Leister with the bumper of a Company car while he was peacefully picketing, causing him injuries which compelled him to wear a collar prescribed by his doctor (A. 1034-1035; 759-762). While the Company further asserts that Leister and Kelley were "involved" in other incidents (typewritten brief, pp. 20-21), the record merely shows that they

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[5] The Examiner properly described this incident (A. 1033) as:

> Hoar withdrew his hand when Harold Leister threatened to "flatten him," and Floyd Leister, one of the pickets who was present, restrained Harold Leister by grabbing his arm.

were present while others engaged in misconduct (A. 364, 412-413, 729-731, 747-748, 756).[6] As to the Company's assertion that employee Burge's stone throwing broke the window of a Company truck (typewritten brief, p. 21), we note that although the Company's general manager, Stuckey, saw the stonethrowing incidents cited in the Company's brief, he did not assert that Burge damaged any trucks, but merely asserted that hours later one of them returned to the plant in a damaged condition (A. 495-498, 562-563).

CONCLUSION

For the reasons stated herein and in our main and initial reply briefs, we respectfully submit that the petition for review should be denied, and that a decree should issue enforcing the Board's order in full.

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[6] Cf. *International Ladies Garment Workers' Union v. N.L.R.B.*, 99 U.S. App. D.C. 64, 69-71, 237 F.2d 545, 550-552 (1956).